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CASES AT LARGE

CONCERNING

TITHES;

CONTAINING

All the RESOLUTIONS of the reſpective COURTS of EQUITY, particularly thoſe of the EXCHEQUER, taken from the printed REPORTS, and MANUSCRIPT COLLECTIONS, moſtly by Sir SAMUEL DODD, late Lord CHIEF BARON, never before publiſhed;

Together with

All the APPEALS in the HOUSE of LORDS, to and in *Trinity* Term, 22 *Geo.* III.

To which is prefixed,

An INTRODUCTION, comprehending a conciſe View *of the whole Law of* TITHES, with Obſervations on ſeveral Caſes of APPEAL, *that have been adjudged within* the laſt ten Years, of his preſent Majeſty's Reign;

Likewiſe

A full VINDICATION of the CLERGY, reſpecting their SUITS for TITHES:

ALSO

An APPENDIX of ACTS of PARLIAMENT, With *Readings*, particularly on Stat. 13 *Eliz.* chap. 10. and chap. 20. on which Acts, and the Conſtruction of them, depends the whole Learning reſpecting, and the Validity of, all Alienations of Eccleſiaſtical Livings at this Day.

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By JOHN RAYNER, of the INNER TEMPLE.

IN THREE VOLUMES.

VOLUME II.

"*Non meâ quidem fide, ſed diligentiâ ſolummodo.*"

Sir HEN. SPELMAN.

LONDON:

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Easter Term, 4 Geo. II.

May 13, A. D. 1731.

In the *Exchequer*.

Sir *James Reynolds*, Lord Chief Baron.
Sir *Lawrence Carter*.
Sir *John Comyns*.
Sir *William Thomson*.

Sir *Philip Yorke*, Attorney-General.
Charles Talbot, Solicitor-General.
Sir John Strange, Recorder of *London*.

Kennedy, Clerk, againſt *Goodwin*.

RECTOR brings a bill for tithes, in the pariſh of *South Okenden*, in the county of *Eſſex*.

Modus of 4*l.* 10*s.* a year, for a farm of 30*l.* is too rank. *Bunb.* 301. pl. 324.

The defendant inſiſts upon a *modus* of four pounds, ten ſhillings, payable yearly, at ſuch a day, for his farm called *Quince Farm*, which was thirty pounds a year.

It was objected for the plaintiff, that this *modus* was too rank, and of that opinion was the whole court; and the defendant was decreed to accompt.

Trinity Term, 4 & 5 Geo. II.

July 14, A. D. 1731.

In the *Exchequer*.

John Webb, Plaintiff.
John Giffard, Clerk, Defendant.

In a ſuit for tithe of lambs the defendant inſiſts on a *modus* of 3 *d.* for every lamb, payable on St. *Mark*'s day, or ſo ſoon after as demanded. This *modus* is not void in law, but the validity of it ſhall be determined by a jury, 4 *Brown* 212. pl. 26.

THE plaintiff was rector of the pariſh of *Stoke* next *Guildford*, in the county of *Surry*, and the defendant was a farmer and occupier of lands in the ſame pariſh.

In *Michaelmas* term, 1729, the plaintiff exhibited a bill in the court of *Exchequer*, againſt the defendant, ſetting forth, that he was intitled to all the tithes ariſing in the pariſh, or to ſome recompence or ſatisfaction in lieu thereof, and that the defendant, from the year 1726 to the time of exhibiting the bill, had occupied great quantities of paſture land, on which he kept great numbers of ſheep, from which he had lambs yeaned, the tithes whereof were demanded by the bill. The defendant, by his anſwer, admitted the plaintiff to be rector, and that the defendant occupied a farm and lands in the pariſh, conſiſting of twenty-eight acres of meadow, and two hundred and forty acres of arable land; but no paſture ground, except as his arable came round in courſe of huſbandry to be ſowed with graſs ſeeds; when ſowed with ſummer corn: He alſo admitted, that about *Michaelmas* he bought a number of ewes with lamb, and had from them great numbers of lambs, which he ſold; but inſiſted, that the plaintiff was not intitled to tithe in kind of lambs, for that there had been the following ancient uſage and cuſtom, approved within the pariſh,

viz.

viz. that every occupier of lands and tenements within the ſaid pariſh, having a lamb or lambs yeaned within the ſaid pariſh, ought, and for time out of mind had uſed to pay the rector of the ſaid pariſh for the time being, or his leſſee, for every lamb ſo yeaned within the ſaid pariſh, the ſum of three pence, and no more, as a *modus*, and in lieu and full ſatisfaction of the tithe of every ſuch lamb: and that the ſame was payable yearly on Saint *Mark*'s day, or ſo ſoon after as demanded; and that the ſame had been accepted by the rector of the ſaid rectory for the time being, in lieu of tithe of lambs.

On the 14th of *July*, 1731, the cauſe came on to be heard; when it was, among other things, decreed, that it ſhould be referred to a trial at law, to try the *modus* as ſet forth and inſiſted on by the defendant, in his anſwer, at the then next lent aſſizes for the county of *Surry*, in a feigned action; and the uſual directions were given for that purpoſe.

This decree was made by two of the barons only; and therefore, in order to have the opinion of the whole court, the plaintiff, by petition, alledged that he conceived himſelf aggrieved by the ſaid decree; for that admitting the *modus* to be in fact as inſiſted on, yet that the ſame was void in law, and as ſuch ought not to be allowed; and to have a trial of that, which in itſelf was void in law, would be fruitleſs and vain; and therefore prayed that the cauſe might be reheard, as to the demand of the lambs.

This petition was argued before all the Barons on the 29th *November*, 1731; and they being of opinion, that the ſaid *modus* for tithe lambs was not a void *modus* in law, refuſed to grant a rehearing on that point, but left the plaintiff to try the *modus* at law if he thought fit.

The

The plaintiff declining to go to a trial purſuant to the ſaid order, it was on the 28th of *November*, 1732, ordered that the plaintiff ſhould ſhew cauſe, at ſetting down the cauſes after *Michaelmas* Term, why the *modus*, as inſiſted on, ſhould not be taken *pro confeſſo*; and no cauſe being ſhewn, the order was, on the 9th *December* following, made abſolute. And on the 8th of *February*, 1732, it was ordered, adjudged, and decreed, that ſo much of the plaintiff's bill, as related to his demand of tithe lambs in kind, ſhould be diſmiſſed with coſts.

See this caſe on appeal, under the name of *Gifford* and *Webb*, 5th of *May*, 1735. And ſee the caſes of *Heaton* againſt *Regal*, and the caſe of *Crofts*, both under *Michaelmas* Term, 8 *Geo.* I. and of *Reynolds* againſt *Vincent*, under *Trinity* Term, 9 *Geo.* I.

Michaelmas Term, 5 Geo. II.

November 4, A. D. 1731.

In the *Exchequer*.

Chamberlain, Rector of *Braybroke* in the county of *Nottingham*, } Plaintiff.

Spencer, and about forty others, Defendants.

Upon a bill for glebe, common, and tithes, court inclined to follow ſame rule, as they did in the caſe of *Sweetapple* againſt the Duke of *Kingſton*.

BILL was preferred for glebe, common, and tithes; the caſe upon the bill and anſwer were almoſt exactly the ſame as that of *Sweetapple* againſt the Duke of *Kingſton*, [which ſee under *Trinity* Term, 1 *Geo.* II.] the court was inclined to follow the ſame *Bunb.* 238. n.

rule

rule in *this* caſe as in *that*; but the plaintiff agreed to have his bill diſmiſſed as for the glebe and common.

November 7, A. D. 1731.

In the *Exchequer*.

Brinklow and others againſt *Eamonds* Rector of the pariſh of *Newton Longville*, in the county of *Buckingham*.

Modus of tithe milk in kind, being a payment of part for the whole, is bad. *Bunb.* 307. pl. 390.

A Bill was exhibited by the land-holders, *&c.* to eſtabliſh ſeveral *moduſes* in the pariſh of *Newton Longville*, in the county of *Buckingham*.

1. That tithe milk ought to be paid by every tenth evening and morning's meal, in kind, from *Hoe Monday*, to the ſecond day of *November*, to commence upon the evening of *Hoe Monday* (*that is* the *Monday* fortnight after *Eaſter* day) and the morning following, to be taken by the rector, at the place of milking, and no tithe milk to be paid for the reſidue of the year.

Hoe Monday, the *Monday* fortnight after *Eaſter* day.

But *by the court*, this is void upon the face of it, being only payment of part for the whole.

2. The ſecond was a *modus* of an half-penny for each calf in lieu of calves, payable on *Wedneſday* before *Eaſter*; this was admitted by the defendant, and eſtabliſhed.

Modus of an half-penny for each calf, eſtabliſhed.

3. The third was a ſmoak penny, in lieu of firewood, burnt in their reſpective houſes, which was alſo admitted and eſtabliſhed.

Modus of a ſmoak penny for fire-wood, good.

4. The fourth was an half-penny, payable on ſheer day, for the wool of each ſheep dying between *Candlemas*

Modus of an half penny for the wool of each ſheep dying, eſtabliſhed.

Candlemas and ſheer day, which was likewiſe admitted and eſtabliſhed.

Modus of four-pence a month for the tithe of wool of ſheep ſhorn in the pariſh, eſtabliſhed.

5. The fifth was four-pence a month, payable on ſheer day, for the tithe of wool of every hundred ſheep ſhorn in the pariſh, which were brought into it, after the ſecond day of *February*.

Though objected to, for want of proof.

As to this it was objected, for the defendant, that the witneſſes differed in their evidence, as to the time of payment, one proving it to be payable about *Eaſter*, the other a few days after ſheering day; but, notwithſtanding this objection, it was eſtabliſhed, the defendant having no proof in the cauſe.

Modus decimandi of lambs.

6. Where the pariſhioner has ten lambs, the tenth is due to the rector on Saint *Mark*'s day; if nine, the rector is to have one, and pay the pariſhioner an half-penny; if eight, he is to have one, and pay the pariſhioner a penny; and when ſeven lambs, the rector is to have one, and pay the pariſhioner three-pence half-penny; but for a leſs number is to have no lamb, but is only to have an halfpenny paid him for each lamb under ſeven.

This was eſtabliſhed, notwithſtanding it was objected that by the caſe of *Reignolds* againſt *Vincent*, [which ſee under *Trinity* Term, 9 *Geo.* I.] a payment on Saint *Mark*'s day was adjudged void; but *note*, it was proved in this cauſe, that the parſon had a benefit; for when there were ten lambs, after the pariſhioner had taken two, the rector was to chooſe his one.

See the caſes of *Croſts*; *Heaton* againſt *Regal*.

Modus decimandi of pigs.

7. The like *modus*, as to pigs, was eſtabliſhed.

8 There

8. Three eggs for every cock and drake, payable on *Wedneſday* before *Eaſter*; and for every hen and duck, reſpectively, three eggs, in lieu of tithe eggs, and chickens and ducks, hatched in the pariſh, eſtabliſhed all, as above, without trial, the defendant having no proof. Of eggs and chickens.

Not to extend to turkies, becauſe brought into *England* lately. No ſuch modus for turkeys.

Hilary Term, 5 Geo. II.

January 27, A. D. 1731.

In the *Exchequer*.

Bond againſt *Barrow*.

UPON a bill for tithes of *aſſart* lands; Baron *Comyns ſeemed* to be of opinion, that the words *de novo aſſartatis et aſſartandis*, in the grant of *Edward* the *Firſt*, ſhould be conſtrued to extend only to ſuch lands as were at that time *aſſarted*, or intended ſhortly to be ſo, and not to ſuch as in future ages ſhould happen to be *aſſarted*, eſpecially if no tithes have uſually been paid; as if a man grants tithe wool of his ſheep, that he ſhall have ſeven years hence, if he had no ſheep at the time of the grant, it will be void. Conſtruction of the words "*de novo aſſartatis et aſſartandis*," in the grant of *Edward* the Firſt. *Bunb.* 312. pl. 396. Grant of tithe on cattle not in grantor's poſſeſſion, at time of grant, void.

See the caſe of *Evans* againſt *Newell*, under *Eaſter* Term, 9 *Geo.* I.

February

February 19, A. D. 1731.

In the *Exchequer*.

Poor againſt *Seymour*.

Tithe herbage ſhall not be paid for ſheep ſhorn out of the pariſh, becauſe they are *profitable cattle*. *Bunb.* 313. pl. 398.

BILL for tithe herbage for ſheep depaſtured in the pariſh three or four months, after they had been ſhorn, and then were removed into another pariſh, and ſhorn there.

By the court, no tithe herbage ſhall be paid for ſuch ſheep, becauſe they are *animalia fructuoſa*.

February 19, A. D. 1731.

In the *Exchequer*.

Swinfen againſt *Digby*.

Where land is ſown with turnips, after the corn is cleared, and fed with ſheep and barren cattle, that tithe ſhall be paid of ſuch turnips. *Bunb.* 314. pl. 399.

IN this cauſe, the court declared that where land is ſown with turnips, after the corn is cleared, and fed with ſheep and barren cattle, that tithe ſhall be paid of ſuch turnips; though it was inſiſted upon, for the defendant, that the ſoil in the county of *Staffford* was dry and ſandy, and that this method of huſbandry improved the land, ſo that the plaintiff had *uberiores decimas* of corn, and had received the tithe of lambe and wool of the ſheep ſo fed before, but the court over-ruled this defence, and ſaid it amounted to a *non decimando*, as to turnips.

Michaelmas Term, 5 Geo. II.

A. D. 1732.

In the *Exchequer.*

Benſon againſt *Olive.*

Depoſition of a witneſs examined fifty years before, cannot be read, without ſome account of his death. 2 *Stra.* 920.

UPON trial of an iſſue directed by the court of *Exchequer*, the depoſition of a witneſs examined in 1672, was offered to be read, without any evidence of his being dead, relying on the preſumption from length of time, *which would intitle the reading a deed of that date.*

The Chief Baron refuſed to let it be read, ſaying, a deed had ſome authority from the ſolemnity of hand and ſeal; he ſaid, if proper ſearches or inquiry had been made, and no account could be given of the party, he would have admitted the depoſition at ſuch a diſtance of time.

See this caſe under *Trinity* Term, 3 *Geo.* II.

Michaelmas Term, 6 Geo. II.

October 26, A. D. 1732.

In the *Exchequer*,

Chriſtian againſt *Wrenn* and others.

Depoſitions in the original cauſe, not permitted to be read in the croſs cauſe, becauſe the point in iſſue in the croſs cauſe, was not in iſſue in the original cauſe. *Bunb.* 321. pl. 403.

BILL by the vicar of *Croſthwaite* in the county of *Cumberland* for tithes.

The

The defendants inſiſted on a cuſtomary manner of payment of tithe wool of the elder ſheep, by weighing the wool, and delivering the tenth part without fraud to the vicar, *without ſight* and *touch*, but this was over-ruled on the authority in *Hob.* 107.

They alſo inſiſted on a *modus* in lieu of lambs and the wool of lambs the firſt clipping, when they are called hog-ſheep, *viz.* eleven-pence for every tenth lamb, *and ſo in proportion*, for a leſs number.

They alſo preferred a croſs bill to eſtabliſh this *modus*, but varied from *that* in the anſwer, that whereas *there* it was ſaid "*and ſo in proportion*," *&c.* that fact not being true, *here* the proportion for each under ten was ſet out, as for nine lambs nine-pence halfpenny, *&c.*

The plaintiff examined no witneſſes in the croſs cauſe, but obtained an order, that the depoſitions in the original ſhould be *read* in the croſs cauſe.

Now upon the hearing, the plaintiff in the croſs cauſe offered to read the depoſitions in the original cauſe; but it was objected, that the *modus* in the croſs cauſe, was a different *modus* from *that* in the anſwer to the original bill, and therefore was not in iſſue on that examination; and of that opinion was the whole court; ſo the plaintiff had a decree for an account in the original cauſe, and the croſs bill was diſmiſſed with coſts.

See the caſe of *Laithes* againſt *Chriſtian*, under *Michaelmas* Term, 8 *Geo.* II.

Hilary

Hilary Term, 6 Geo. II.

February 20, A. D. 1732.

In the *Exchequer.*

At *Serjeant's-Inn.*

Lady *Charlton* againſt Sir *Blunden Charlton.*

LORD Chief Baron *Reynolds* declared it as his opinion, that there could be no preſcription in *non decimando* againſt a lay rector, any more than againſt a ſpiritual rector, and that they were equally intitled to tithes of common right; and that it was ſufficient for a lay rector to ſet forth in the bill, that he was *ſeiſed of the impropriate* rectory; and if he made out *his* title to that, *it* would be ſufficient, without putting him to the proof of having received tithes; and to this opinion Baron *Comyns* ſeemed to aſſent; but *note*, he diſtinguiſhed between one who ſet up a title to the *rectory*, and one who intitled himſelf only to the tithes, or any *ſpecies* of tithes, within a pariſh; for in this laſt caſe the plaintiff ſhall be held to ſtrict proof, not only of his title, but alſo of the preſcription of all other tithes he ſets up a title to; and in this preſent caſe, the plaintiff having ſet forth a title in Sir *Francis Charlton* (under whom ſhe claimed) to all the tithes in the pariſh of *Lucford* (except ſuch ſmall tithes as the vicar uſually received) and not to the rectory; and the defendant denying the plaintiff's title to the tithe herbage, and the plaintiff not being able to prove any herbage tithe ever paid, though ſhe attempted to prove the unity of poſſeſſion for above ſeventy years, yet the bill was diſmiſſed.

There can be no preſcription in *non decimando*, againſt a lay rector, any more than againſt a ſpiritual rector. *Bunb.* 325 pl. 407.

See the caſe of the corporation of *Bury* againſt *Evans*, under *Trinity* Term, 9 *Geo.* II.

Trinity Term, 6 and 7 Geo. II.

June 6, A. D. 1733.

In the *Exchequer*.

Salmon and others againſt *Rake*, Rector of *Holcombe*, in the county of *Somerſet*.

Injunction, to the ſpiritual court, to ſtay a libel for tithes, where a *modus* is ſought to be eſtabliſhed. *Bunb.* 176. n.

A Like bill as that brought in the caſe of Sir *Edward Blacket* againſt Doctor *Finney*, which ſee under *Trinity* Term, 10 *Geo.* I. for eſtabliſhing *moduſes*, ſome whereof the defendant admitted, but abſolutely denied the moſt and greateſt of them; and *by the whole court of Exchequer*, though the plaintiff here had not put in a plea to the libel in the Spiritual Court, yet ſince that court cannot * *try moduſes*, and the bill prays an eſtabliſhment thereof, an injunction was granted.

June 11, A. D. 1733.

In the *Exchequer*.

Gibb, Clerk, againſt *Goodman* and others.

Where the day of payment of a *modus* is admitted in an anſwer, it may be ſupplied by evidence, but not if omitted in a bill to eſtabliſh a *modus*. *Bunb.* 328. pl. 499.

BILL for tithes by the vicar of *Bedminſter* in the county of *Somerſet*.

The defendants inſiſted on a *modus* of four-pence for the milk of each cow, and ſix ſhillings and eight-pence for every tenth calf, for the tithe of all calves; *note*, no day was alledged in the anſwer, which, according to former precedents, ſeemed to be a fatal

* *Quære*, if you ſhould not read "cannot *direct an iſſue to* try the *modus*," becauſe no court of *equity* can *try* a cauſe by a jury. The Editor.

objection;

objection; yet, *by the whole court*, the defendant was permitted to prove the day by depoſitions; and thereupon the court directed an iſſue to try the ſame, with liberty to indorſe the *poſtea*.

Note; the Lord Chief Baron took this diſtinction, that in an anſwer the day may be ſupplied by the evidence, ſo as to be a foundation for the court to direct an iſſue; but in a croſs bill to eſtabliſh a *modus*, a day muſt be expreſsly alledged.

Note; it was objected, that the ſix ſhillings and eight-pence was too rank; and it was not alledged that any thing was payable, if there were leſs than ten calves; both which ſeemed material objections; but the court thought a *verdict* might make it good.

Modus of ſix ſhillings and eight pence for one calf in ten, and not ſaid, "and ſo in proportion, if there be a leſs number than ten," is bad.

May 20, 1733, this cauſe came on again upon the return of the *poſtea*; the jury found the iſſue for the *modus* for the milk, and that the *modus* of four-pence was payable at *Eaſter*; ſo as to *that*, the bill was diſmiſſed with coſts, both at law and in equity, as to ſo much.

As to the other *modus* for calves, the jury found it, but no day when payable; but upon the objection, that it was not ſaid, "and ſo in proportion, if there be a leſs number than ten;" and the jury not having found it ſo (if they had, *quære (ſays the reporter)* if it would have made any difference) the defendant was decreed to account for tithe calves, but no coſts were allowed, on either ſide, at *law*, as to this *modus*, the *fact* being for the defendant, the *law* for the plaintiff.

See the caſes of *Philipps* againſt *Symes*, under *Trinity* Term, 11 *Geo.* I. *Wortley Montague* againſt ———, under *Eaſter* Term, 1 *Geo.* II.

Hilary Term, 7 Geo. II.

January 28, A. D. 1733.

In the *Exchequer*.

Beaver againſt *Spratley*.

Bill for tithes, laying a cuſtom for the pariſhioners to give notice of ſetting out tithes, or that there is ſome other cuſtom of the like nature, held bad, and diſmiſſed with coſts. *Bunb.* 333. pl. 414.

THE plaintiff as leſſee of Mr. *Blagrave*, impropriator of *Stratfield Mortimer*, in the county of *Berks*, brought his bill for tithe of wheat, barley, *&c.* and ſet forth, that by the cuſtom in that pariſh, all the occupiers ought to give notice to *the perſon intitled to the tithes*, of ſetting forth their tithes, *or there was ſome other cuſtom of the like nature*, and that the defendant had not given notice, and prayed an account.

Now, upon the hearing, it was objected for the defendant, firſt, that it was unreaſonable the occupier ſhould be obliged to give notice to the perſon intitled to the tithes, for he might live one hundred miles out of the pariſh.

Barons *Carter* and *Comyns* thought there was ſomething in the objection, though the Lord Chief Baron thought this well enough, for notice to the ſervant would be good notice in that caſe.

The ſecond objection was, that it was too uncertain, "*or ſome other cuſtom of the like nature*"; to which it was anſwered, that this bill was not to eſtabliſh a cuſtom, it was but only for an account; and the cuſtom was only alledged as an inducement to that demand; tho' in the firſt caſe greater certainty was required, becauſe it is to be the foundation of an iſſue, which

which is generally directed before a court of equity eſtabliſhes a cuſtom.

But *by the whole court*, this is a fatal objection to the cuſtom, and *that* being the foundation of the plaintiff's demand, we cannot decree an account, without firſt eſtabliſhing the cuſtom; and the bill was diſmiſſed with coſts.

January 31, A. D. 1733.

In the *Exchequer*.

Smith againſt *Morgan*.

A Bill was preferred for twelve or thirteen different ſorts of tithes, and the plaintiff did not abridge his demand by his replication; upon the hearing it was referred to an account, but coſts were reſerved generally till the report came in.

The court (too haſtily in the opinion of the reporter) decreed plaintiff his coſts generally on a bill for thirteen different ſorts of tithes, tho' the plaintiff proved but one *ſpecies* of tithes due, nor did he abridge his demand by his replication. *Bunb.* 335 pl. 417.

Now upon the report it appeared, the defendant was indebted to the plaintiff for one *ſpecies* of tithes only, (*viz.* wood) forty pounds, but not for any of the other tithes demanded by the bill; and therefore it was inſiſted for the defendant, that the plaintiff ſhould have his coſts, only *as to* the wood, which was reported for him, but that he ought to pay coſts for all the others demanded, and which he had not proved.

Note, This ſeemed very reaſonable, the plaintiff not having abridged his demand by his replication, but having put the defendant to the trouble and expence of entring upon the proof of the other matters, but the court (too haſtily) decreed coſts generally to the plaintiff.

Michaelmas Term, 7 Geo. II.

November 15, A. D. 1733.

In the *Exchequer*.

Sir *James Reynolds*, Lord Chief Baron.
Sir *Lawrence Carter*.
Sir *John Comyns*.
Sir *William Thomſon*.

No Attorney General.
Charles Talbot, Solicitor General.
Sir *John Strange*, Recorder of *London*.

Thomas Lewis, Eſq. ——— Plaintiff.
Rees Griffith, —— Defendant.

A parſon may ſue in a court of equity for his tithes, be the amount of the demand ever ſo ſmall. 4 *Brown*, 314. pl. 39.

THE dean and chapter of *Worceſter*, being, in the right of their church, ſeiſed in fee of the impropriate rectory of the parſonage of *old Radnor*, and all manner of tithes ariſing and renewing yearly within the ſaid pariſh; by indenture of the leaſe under their common ſeal, dated the 25th of *November*, 1723, demiſed the ſame to the moſt noble *James* Duke of *Chandos*, his executors, adminiſtrators, and aſſigns, from the date of the ſaid leaſe, for twenty-one years, under the yearly rent therein mentioned.

And by indenture dated the 15th of *February*, 1728, the Duke aſſigned the ſaid leaſe and premiſſes to the plaintiff, his executors, adminiſtrators, and aſſigns, ſubject to the ſaid yearly rent, whereby the plaintiff became well intitled to all the tithes and duties ariſing and growing within the ſaid rectory, and the titheable places thereof.

The

The defendant after the ſaid 15th of *February*, 1728, occupied a meſſuage and lands within the ſaid pariſh, and particularly thirty acres of meadow and paſture ground; but neglecting to tithe the ſame, for the years 1729 and 1739, or to make the plaintiff any ſatisfaction for ſuch tithes; he, in *Michaelmas* Term 1730, filed his bill in the court of *Exchequer* againſt the defendant, for an account and ſatisfaction thereof.

To this bill the defendant put in his anſwer, and thereby admitted it to be the general opinion of the country, that the plaintiff was owner of the tithes; ſaid that he occupied one meſſuage, a ſmall garden, five acres of arable, four acres of paſture ground, and an acre and half of meadow; that as to the meadow, he was tenant at will, at 1 *l.* 6*s.* a year, and that it was, in the general opinion, tithe free, and never any tithe hay was paid for the ſame; but being only tenant at will, and the value of the tithe ſmall, and rather than give any colour for a ſuit, he ordered his ſervant, mowing there in 1729, in caſe the plaintiff's agents demanded tithe hay, to ſet it out: that ſoon after, *Henry Davis*, the plaintiff's ſervant, who had been a tithe gatherer thirty years, being offered to have the hay tithed, anſwered he never gathered tithe from thence, and would not meddle with it, and they might carry it away; whereupon the hay was carried home untithed. That in the year 1730, *Edward Turner*, the plaintiff's agent, came to the ſaid meadow, and ſaw the hay tithe, and opened one of the cocks, and imagining no tithes were due, went away, and ſaid he would conſult *Howell Lewis*, the plaintiff's chief agent, and ſoon after returned and ſaid, he would not meddle with it, whereupon the defendant carried it home:

and that having grazed the ſaid meadow each year, till the middle of *May*, he had but little hay, and believed the tithe thereof was not worth above one ſhilling and ſix pence each year; but knew not how the ſaid meadow became exempt from the payment of tithes.

Iſſue being joined, ſeveral witneſſes were examined, who proved the demand of tithe hay of the ſaid meadow, and that the defendant forbid the plaintiff to take the ſame, but no proof was given of the pretended exemption.

On the 15th of *November*, 1733, the cauſe was heard before the Barons of the *Exchequer*, who decreed, that the defendant ſhould account with and ſatisfy the plaintiff for the value of the tithes of hay of the ſaid meadow for the year 1729 and 1730; and it was thereby referred to the deputy remembrancer to take ſuch account, and to make his report with all convenient ſpeed; and the cauſe was to continue in the paper of cauſes, to be further heard upon coming in of the ſaid report. In purſuance of this decree, the deputy on the third of *February*, 1734, made his report, and thereby certified, that there was due to the plaintiff from the defendant for the value of tithe hay of the ſaid meadow, for the years 1729 and 1730, the ſum of nine ſhillings. And the cauſe being heard upon this report, on the 10th of the ſame month, the court decreed that the report ſhould be affirmed, and that the defendant ſhould pay the plaintiff the ſaid nine ſhillings reported due, together with coſts of the ſuit, to be taxed; and which were afterwards taxed at the ſum of fifty-one pounds, five ſhillings, and eight-pence.

See this caſe on appeal, under *Trinity* Term, 11 *Geo.* II.

Michaelmas

Michaelmas Term, 8 Geo. II.

October 31, A. D. 1734.

In the *Exchequer.*

Sir *James Reynolds*, Lord Chief Baron.
Sir *Lawrence Carter.*
Sir *John Comyns.*
Sir *William Thomſon.*

John Willes, Attorney General.
Dudley Ryder, Solicitor General.
John Strange, Recorder of *London.*

Laithes and others againſt *Chriſtian*, vicar of *Croſthwaite*, in *Cumberland.*

BILL by the owners and occupiers of lands in the pariſh of *Croſthwaite* in the county of *Cumberland*, to eſtabliſh *moduſes*; one in the two foreſts of *Barrowdale* and *Wythburn* within the pariſh, the other within the pariſh at large; but there was no variance of the *moduſes*, only as to the ſums payable; ſo that there were in effect the ſame as to the point in diſpute now, which was this.

Iſſue directed to try a *modus*, though not proved exactly as laid in the bill. *Bunb.* 340. pl. 422.

The plaintiffs by their bill laid their *moduſes* to be for every tenth lamb, payable on *Monday* next after *Midſummer-day*, after the lambs fallen, *except ſuch as were not alive on Midſummer-day*, in lieu of lambs, and *the wool* of ſuch lambs, which were called hog-ſheep.

The defendant in his anſwer admitted there were ſuch *moduſes* payable as in the bill for lambs only, but

but not for the *wool*; and moſt of the witneſſes agreed with the bill, as the defendant did, except the being paid for the *wool*.

The plaintiff had but one or two witneſſes to prove (and in the pariſh at large only) that the *modus* was for lambs alive on *Midſummer-day*; all the reſt of their witneſſes proved that it was for ſuch as were alive on the *Monday* next after *Midſummer-day*; which varied from the bill, and therefore the defendant objected, that the plaintiffs had not proved the *modus* as laid in the bill; but the defendant having admitted, and his witneſſes agreeing with the bill, but differing only as to the extent of it, the court thought here was a ſufficient ground to grant an iſſue to try the *moduſes*, with liberty for the judge to indorſe the *poſtea*, which they accordingly directed.

See the caſe of *Chriſtian* againſt *Wrenn*, under *Michaelmas* Term, 6 *Geo.* II.

Eaſter Term, 9 Geo. II.

May 5, A. D. 1735.

In the *Houſe of Lords*.

John Gifford, Clerk, —— Appellant.
John Webb, —— Reſpondent.

4 *Br.* Ap. in Parl. 214.

FROM the decrees, orders, and proceedings, in this caſe, [which ſee under *Webb* and *Gifford*, in *Trinity* Term, 5 *Geo.* II.] the preſent appeal was brought; and on behalf of the appellant it

was contended, that the iſſue to try the *modus* ought not to have been directed before the objections to the validity and legality of the *modus* were conſidered by the court, becauſe, if the objections were allowed, there had been no foundation to ſend ſuch iſſue to be tried; and on the other hand, if ſuch iſſue were tried, and a verdict obtained, eſtabliſhing the fact of the *modus*, and afterwards, on hearing the objections, the court ſhould be of opinion, that it was not a good *modus*, the parties would then have been put to great charges and trouble, to no purpoſe. It was however ſubmitted, that after the iſſue was taken *pro confeſſo* againſt the appellant, the objections ought to have prevailed, and the *modus* been ſet aſide; becauſe a cuſtom or uſage to pay a ſum of money in lieu of tithes, muſt be immemorial; but if it can be ſhewn by evidence, or from any thing in the nature of the payment, that it is not ancient, and immemorial, then it is not a *modus*, but only a compoſition, which may bind the parſon that makes it, but cannot bind the ſucceſſor, without his conſent. It is well known, that in ancient times, and long within the time of legal memory, the price of cattle, and other commodities, was ſo much lower than at preſent, that a lamb, which may now be worth 2 *s.* 6 *d.* 200 years ago would not have been worth more than 6 *d.* or in ſuch proportion. But in the preſent caſe, the ſum of 3 *d.* inſiſted on to have been anciently and immemorially paid in lieu of every lamb (which ſets the price of every lamb at 2 *s.* 6 *d.*) is ſo near the value of ſuch tithes, even at this day, that it proved itſelf to be a modern compoſition only, and not an ancient cuſtomary immemorial payment or *modus*; and therefore ought not to bind the appellant, who had a right to his tithes in kind.

Modus and compoſition, their difference.

On

On the other side it was argued, that the *modus* being a matter of fact, if in any wise doubtful, was properly triable by a jury, especially as the appellant, at the hearing of the cause, refused to admit the fact of such *modus*; and the court would not bar the appellant of his right to tithes, until the respondent had established the fact of the *modus* he had insisted on, in the most solemn manner, by a trial at law. As to the objection, that the *modus* upon the state of it was void, and ought not to be allowed; and that therefore the trial of such an issue would be vain and fruitless; the ground of the objection seemed to be, that the *modus* was so great, and so near the value of the tithable matters for which it was paid, that it could not be presumed to be well established as a *modus* or prescriptive payment, but must be a modern composition, considering the decrease of the value of money for two or three centuries past; but this objection arising upon a matter of fact, was very proper to be considered by a jury, who would enquire as to the value of lambs in the place where this controversy arose; and therefore it was hoped, that the decree and orders would be affirmed, and the appeal dismissed with costs.

Decree affirmed, Lords Journ. XXIV. 542.

Accordingly, after hearing counsel on this appeal, it was ordered and adjudged, that the same should be dismissed, and the decree and orders therein complained of, affirmed.

Trinity Term, 11 Geo. II.

June 7, A. D. 1737.

In the *Houſe of Lords.*

Rees Griffith, - - Appellant.

Thomas Lewis, Eſq; - Reſpondent.

THE appellant, rather than ſatisfy the demand in the original cauſe [which ſee under *Michaelmas* Term, 7 *Geo.* II.] appealed from that decree, inſiſting, that the bill being founded on a ſuppoſed fraud in the appellant, in concealing his tithes, and praying a diſcovery and account of the tithes ſo ſuppoſed to be concealed; and the appellant having, by his anſwer, denied any concealment; the reſpondent, in order to intitle himſelf to any decree upon ſuch a bill, ought to have verified the allegations of it, but which he had not attempted to do; that the appellant having ſtated the matter of fact, as to the tithe of the meadows, and denied all fraud; and as no fraud was attempted to be proved upon the commiſſion, or inſiſted on at the hearing, nothing remained in controverſy between the parties, or to be accounted for, but a demand of 3 *s.* or 4 *s.* for which the reſpondent might have had, and ought to have taken his remedy in a court of law, and not brought the appellant into a court of equity, for a demand ſo very inconſiderable as to be * beneath the dignity of the court to take any notice of. But ſuppoſing the decree proper, there was not the leaſt colour to decree the appellant to account for the tithe hay of the

Exemptions from tithes are not favoured. 4 *Br. Ap.* in Parl. 216. Gr. and Rud. Law and Eq. 338. pl. 10.

* Sir *John Churchill*, as *amicus curiæ*, declared his opinion to be, that a cauſe for *ſmall* tithes was not proper for the court of *Chancery*, and had not been uſed. See *ante*, 53.

year

year 1730, which he had actually ſet out, and which the reſpondent's agent might have carried away, but would not meddle with; nor was there any evidence, that the hay in queſtion was worth 9 *s.* If, however, it really was worth that ſum, the decreeing coſts, which amounted to 51 *l.* 5 *s.* 8 *d.* was ſurely a puniſhment more than equal to the appellant's crime in not paying 9 *s.* and eſpecially as he had ſworn in his anſwer, that the reſpondent never demanded ſatisfaction. Under theſe circumſtances, therefore, it was hoped, that the decree would be reverſed, and the reſpondent's bill diſmiſſed with coſts.

On the other ſide it was ſaid, that tithes in kind are due of common right, and no preſumption from report only ought to be of any weight to avoid a demand ſo founded; and though the appellant, by his anſwer, had ſet up a pretence of exemption from tithes, yet he had given no proof of it, nor had he ſet up any *modus* or compoſition in lieu of tithes; that it appeared clearly, from the proceedings in the cauſe, that the appellant controverted the reſpondent's right to the tithes; and therefore it was proper to ſue in a court of equity, in order to aſcertain and ſettle ſuch right; and that the appellant's anſwer, as to his not diſputing the reſpondent's right, was inconſiſtent with itſelf; for though he admitted, that he would have paid tithe for his hay, had he thought the reſpondent would have required it, yet he did not even ſubmit, by his anſwer, to pay any tithe for the ſame, though the reſpondent had required it by his bill.

Decree affirmed, Lords Journ. XXV. 141.

After hearing counſel on this appeal, it was ordered and adjudged, that the ſame ſhould be diſmiſſed, and the decree therein complained of, affirmed.

Hilary

Hilary Term, 11 Geo. II.
January 28, A. D. 1737.

In *Chancery*.

Philip, Lord *Hardwicke*, Lord Chancellor.
Sir *Joſeph Jekyll*, Maſter of the Rolls.

Cliſton againſt *Orchard*, Clerk.

THERE having been two verdicts in this caſe in favour of the plaintiff in equity, the *modus* was now eſtabliſhed with the coſts at law, but none were given, with regard to the proceedings in equity; for Lord Chancellor ſaid, the ſuit in this court was merely for the ſecurity of the plaintiff, and to prevent any farther impeachment of his right to *an exemption* from the payment of tithes in *ſpecie*, and that this was like the caſe of a bill brought to perpetuate the teſtimony of witneſſes, wherein coſts are never given againſt the defendant; that the plaintiff might have applied for a prohibition, and if he had ſucceeded therein at law, he would have had his coſts, and he ought to have the ſame advantage with regard *to the proceedings at law* directed by this court, but that there was no pretence for any other coſts.

The plaintiff intitled to his coſts at law only, and not in equity, though a *modus* be eſtabliſhed by two verdicts, on iſſues directed by this court to try the ſame. *Tr. Eck.* Rep. 610. pl. 277.

His Lordſhip decreed the *modus* to be eſtabliſhed, and ordered the defendant to pay coſts to the plaintiff, in reſpect to the proceedings at law, to be taxed; but as to coſts in equity, relating to the *moduſes*, his Lordſhip did not think fit to award any to be paid by either of the ſaid parties.

Hilary

Hilary Term, 12 Geo. II.

A. D. 1738.

In the *Exchequer*.

Sir *John Comyns*, Lord Chief Baron.
Sir *Lawrence Carter*.
Sir *William Thomſon*.
Sir *Thomas Parker*.

Dudley Ryder, Attorney General.
John Strange, Solicitor General and Recorder of *London*.

Wallis againſt *Pain* and *Underhill*.

Tithe for clover and graſs ſeed due to vicar, as being a ſmall tithe.
Com. Rep. 633. pl. 269.
Bunb. 344. pl. 424.

BILL was exhibited in the *Exchequer*, by the plaintiff, who was tenant or farmer under the impropriator of the great tithes, in the pariſh of *Prittlewell*, in the county of *Eſſex*, and inſiſted the defendant ſowed a field with clover, which was cut for hay; he let the aftermath grow for ſeed, which was cut and threſhed for ſeed, of which the plaintiff ought to have the tithe as a great tithe. The defendant *Pain* inſiſted, that he was farmer of a farm called *Milton-hall*, and that there was a *modus* to pay two-pence an acre, and ten buſhels of wheat to the vicar, in lieu of all ſmall tithes, that he had paid to the plaintiff for the tithe hay of his clover, and that the aftermath of clover ſtood for ſeed, and was threſhed for ſeed, which was a ſmall tithe, and payable to the vicar; and Mr. *Underhill* the vicar inſiſted upon the tithe of clover ſeed, as a vicarial or ſmall tithe.

And

And by the depoſition of ſeveral witneſſes it appeared, that the difference between clover cut for hay, and that cut for ſeed, was conſiderable; that when made into hay, it was cut while the graſs was green, and fit for cattle to eat; that when cut for ſeed, it ſtood till the ſtalk was ſear and good for nothing, but was thrown out for ſtover or fodder, and the ſeed was the only thing of value, or regarded; and that the tithe of clover ſeed had been always paid to the vicar in that pariſh, and looked upon as ſmall tithe; that the impropriator had never received it but once, about five years ago, when the plaintiff took it from a woman in the pariſh; but for twenty or thirty years the defendant had received it as ſmall tithes, and fifty years ago it had been paid to or for the vicar; indeed the vicar *Mr. Underhill*, for the great part of the time he has been vicar, held the great tithes likewiſe.

It was argued by Mr. *Bunbury* and Mr. *Bootle*, that clover ſeed is in the nature of great tithe, and due to the plaintiff; for as tithe hay is due to him, the ſeed of that hay muſt of conſequence belong to him too; that where the parſon is intitled to tithe hay, he will be intitled to the hay made of clover, as well as of other graſs; and if to the hay, likewiſe to the ſeed.

It was agreed, that they could not find that any caſe had been in court, wherein it was determined, that clover ſeed was great tithe, or that it did not belong to thoſe who had the tithe of hay; but two caſes were mentioned, one from Ch. Ba. *Dod*'s note, and it was the caſe of *Stanford* and *Hughes*, as cited in the caſe of *Peacock* and *Cole*, *Hil.* 1694, in theſe words: "Arable land pays tithe to the impropriator in kind, *ſainfoin* was ſown upon the land,

Dod's MSS.

Stanford and *Hughes*, *Peacock* and *Cole*.

and ſtood to ſeed, and the profit was in the ſeed, and not in the ſtalk; there was a cuſtom of two-pence an acre for hay, payable to the vicar;" and it was reſolved, that notwithſtanding the ſtalk and ſeed was in the nature of corn, yet it ſhould be looked on as graſs, and payable accordingly.

Brook and *Hull*, *Hall* and *Babb*.

The other caſe was from Mr. *Brown*'s notes, in theſe words: "It was decreed, that the aftermath of clover graſs is titheable, unleſs a *modus* can be proved, 3 *Jac.* 2. *Brook* and *Hall*;" and *Hall* and *Babb* was cited, *Trin.* 1683.

In this caſe, the Lord Chief Baron cited the caſe of *Pomfret*, parſon of *Luton*, in *Bedfordſhire*, [which ſee under *Trinity* Term, 32 *Car.* II.] that the tithes of ſainfoin ſhould be paid as graſs, and not as grain, though there was proof of thraſhing it, and feeding hogs with it, and making bread with it, and the vicar then had it.

Pomfret againſt *Laundy*.

This caſe of *Pomfret* againſt *Laundy* and *Waite* is found *Trin.* 32 *Car.* II. *fol.* 227. wherein *Laundy* inſiſted, that *ſainfoin* thraſhed was looked upon as grain, and ſown and often thraſhed as grain, and that the tithe belonged to the impropriator, and not the vicar. As to this defendant, the caſe was to be farther heard at the ſetting down of cauſes that term, when the court would further conſider, whether he ſhould pay tithe of *ſainfoin* to the impropriator or the vicar, but no ſuch decree can be found; and as to the other defendant *Waite*, the queſtion was determined on ſtat. 31 *H.* VIII. chap. 13.

Now by theſe caſes it appears, that it was thought reaſonable the ſtalk and ſeed ſhould go together, and conſequently,

conſequently, when the impropriator is intitled to the ſtalk, as he is when made into hay, he ought likewiſe to have the ſeed.

And it would be very inconvenient if it was otherwiſe; for the owner might ſhift his tithe to the parſon or vicar as he pleaſed; for when it is firſt cut, it is fit to be made into hay, the tithe whereof will belong to the parſon; but if he let it ſtand to dry, that the ſeed may be ripened and fit to thraſh, then the tithe will belong to the vicar; and when ſhall it be ſaid to be dry enough for the vicar? When it is firſt cut, the tithe ought to be ſet out, and the parſon will have it; but after a while the vicar will claim it, although it was before veſted in the parſon.

On the other ſide it was inſiſted by Mr. *Floyer*, Mr. *Wilbraham*, and Mr. *Starkie*, that clover ſeed is in its nature ſmall tithe, at leaſt it is a vicarial tithe due to the vicar, in the preſent caſe; that there is not one caſe in point againſt it; and tithe of no ſeed was ever looked on as great tithe. It is ſaid, that the ſtalk and ſeed ſhall go together; but it is frequent, that the ſeed or fruit of trees go to the vicar, when the tree goes to the parſon; wood is always reckoned a great tithe, and goes to the rector, unleſs the vicar be ſpecially endowed with it; but acorns, as well as the fruits of all other trees, were always held as ſmall tithe.

But if the matter were doubtful, in this caſe it appears it has always been paid to the vicar for thirty, forty, or fifty years, ſo that there is no pretence in this caſe to ſay it does not belong to the vicar.

But it was a new caſe, and the court took time to conſider of it; and afterwards, in the ſame term, the Lord Chief Baron *Comyns* delivered their opinion as follows, *viz.*

As this was a matter as might be conſiderable in its conſequences, in relation to the quiet of poor vicars, I conſidered two points:

Firſt, Whether clover ſeed was in its nature a ſmall tithe, ſo that it would belong to the vicar, who was endowed *de minutis decimis.*

Secondly, Whether, if that was in any reſpect doubtful, it would not belong to the vicar, under the circumſtances of the preſent caſe?

And the Chief Baron was of opinion, that clover ſeed was in its nature a ſmall tithe. By the conſtitution of *Robert Winchelſea*, Archbiſhop of *Canterbury*, an uniform payment of tithes was eſtabliſhed in the province of *Canterbury* *, "*Volumus quod decimæ de frugib. (non deduct' expen') integre & ſine diminutione ſolvantur, & de fructibus arborum, de ſeminibus omnibus, de herbis horter' niſi parochiani fecerint redemption' pro talibus decimis:*" Where a manifeſt diſtinction is made between tithes *de frugibus*, and tithes *de fructibus, ſeminibus, & herbis horter'*. And *Lind* ſaith, *fol.* 188. *Decimis.* that tithes *de frugibus*, ſtrictly taken, mean ſuch only *quæ ſolent ligari*; but in a larger ſenſe they comprehend not only tithes † *de frumentis & leguminibus, verum etiam de vino, ſilvis*

* *We will that tithes of grain (without any deduction for expences) be wholly paid, and without any diminution, and alſo of the fruit of trees, of all ſeeds, of garden herbs, unleſs the pariſhioners ſhall redeem ſuch tithes.*"

† *Of corn and pulſe, but alſo of wines, wood, chalk mines, and quarries.*

cæduis,

cæduis, creta, fodinis, & lapicidinis, that is, all ſuch as commonly are reputed great tithes.

But, ſpeaking of tithes *de ſeminibus omnibus*, he ſaith, *fol.* 192. *de decimis*, that they comprehend all ſeeds, * *ſive in campis, ſive in hortis, utpote lini milii, canabi, grana porrorum, ceparum, byſſopi, cauliæ petrocilini, rapi, lathucæ, & aliar' herbarum.*

And upon the words making redemption *pro talibus decimis*, he ſaith, Tithes † *de fructibus, ſeminib' & herbis quæ revera decimas int' minutas computantur; ſunt enim decimæ minutæ quæ proveniunt de milio, mentha, anetho & ſimilibus*; and he takes notice that *Hertienſis* ſays, ‡ "*quod in Angliâ conſiſtunt minutæ decimæ in lanâ, lino, lacte, caſeis & agnis, in partu animalium, pullis, ovis, & decimis horter'; decimæ etiam mellis & ceræ numerantur inter minutas.*

So that by common law, as long as the diſtinction has been made between great and ſmall tithes, which is as long as appropriations to religious houſes who uſually engroſſed the great, but left the ſmall tithes to the curate; all ſeeds have been reckoned as ſmall tithes. How long diſtinction between great and ſmall tithes.

The common law ſeems to follow the canon law in this point. 2 *Inſt.* 649. *Coke*, ſpeaking of tithes,

"* *Whether in fields, or in gardens, as flax, millet, hemp, ſcallion, anion, hyſſop, ſtone, turnips, lettuce, and other herbs.*"

"† *Of fruit, ſeed, and herbs, there are truely reckoned ſmall tithes; for thoſe tithes are the produce of millet, mint, aniſe, and the like.*"

"‡ *That ſmall tithes in* England *conſiſt of wool, flax, milk, cheeſe, and lambs, in the young of animals, in pullets, eggs, and tithes of gardens; honey and wax are alſo reckoned ſmall tithes.*"

ſaith, * *quædam ſunt majores, frument' zizania, fœnum, & quædam minores ſive minuti, quæ proveniunt ex menthâ, anetho, olerib' & ſimilibus.*

Small tithes.

And all the reſolutions relating to tithes, which proceed from things newly introduced into *England*, have held them to be ſmall tithes; it was ſo reſolved, *Paſch.* 38 *Eliz. Baddingfield* and *Frank. Cro. Eliz.* 467. *Mod.* 909. 1 *Rol. Abr.* 310, 335. *Own.* 74.

Saffron.

And in this caſe, the vicar ſues the impropriator for the tithes of ſaffron, in the eccleſiaſtical court, no prohibition ſhall go.

So if the field was formerly ſowed with corn, and after be ſown with ſaffron, the tithes ſhall be paid to the vicar; for by *Popham*, the tithe of ſaffron heads are ſmall tithes; and though the tithes of the field have been paid to the parſon, yet when converted to another uſe, whereof no graſs tithes come, the vicar ſhall have the tithes.

Woad.

So Sir *Richard Uvedale* againſt *Tindale*. *Hutt.* 77. *Cro. Car.* 78. the queſtion was on a ſpecial verdict, if woad was ſmall tithe or great? and it was unanimouſly agreed that woad was ſmall tithes; for if no circumſtances be to difference the caſe, hemp, line, ſaffron, hops, tobacco, and all ſuch new things ſhall be *minutæ decimæ*.

So 1 *Sid.* 447. where a prohibition was prayed to a ſuit by a vicar for tithe of woad, ſuggeſting it to be a great tithe, the court doubted, becauſe it is

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"* *Some are great, corn, darnel, hay; and ſome ſmall, as the tithes of mint, aniſe, pot herbs, and the like.*"

reckoned, as the book says, *inter minutas decimas*, as hops, &c.

So 1 *Sid.* 443. on motion for prohibition to a suit for tithe of hops, it was said hops, woad, and such small things of new invention, are *minutæ decimæ.* Hops.

So *Pal.* 219. *Ward* and *Britton*, the question was, whether lamb small or great tithe; *Bridgman* Chief Justice said, *minutæ decimæ* comprehend only tithe of gardens, hemp, hops, saffron, &c. Lamb.

So 1 *Vent.* 61. it is said hops are of the nature of small tithes. Hops.

So flax was small tithe, resolved by three justices, *Wharton* and *Lisle*. 3 *Lev.* 365. 4 *Mod.* 184. *Carth.* 263. *Skin.* 341, 356. So it was held in *Noah Webb's* case, 14 *Car.* 1 *Rol.* 643. f. 3. *Wharton* and *Lisle.*

It is true, some opinions have been, that small tithes must be estimated, not from the nature of the thing titheable, but from the quantity of the tithes; and therefore it was said in *Uvedale* and *Tindal's* case, if all the profits of a parish consist in such things, hemp, hops, wool, lambs, &c. may be great tithes. So in *God. Ju. Eccl.* 691. it is said hops in gardens are small, in the fields great tithes; and in the case of *Wharton* and *Lisle* *, *Holt* Chief Justice at first seemed of opinion, that tithes must take the denomination of small or great, from the quantity of the crop growing; but the three other justices held strongly, that tithes were great or small, from the nature of the things which yielded the tithes; and *Holt* yielded to it so far, that he absented himself when judgment was given; which he would scarce *Wharton* and *Lisle.*

* See this opinion supported *post* in the notes.

have done, if he had been fixed in the contrary opinion.

And this ſeems the better opinion; for it gives foundation for continual debate, what ſhall be a quantity too large for ſmall tithes; if it be ſaid what grows in a garden. Some gardens are not half an acre, others two or three acres; gardens are enlarged now-a-days to fifty or one hundred.

Perhaps that may be a proper diſtinction as to peaſe, beans, or other pulſe, becauſe they had exiſtence in former times, and appropriations were made *de bladis & leguminibus*, to religious houſes; but as to things newly introduced into *England*, there is but little reaſon that the patentees, who claim only what came to the crown upon the diſſolution of monaſteries, ſhould have tithe of thoſe things which were never appropriated, and to which the religious houſes diſſolved never had title.

As to clover-ſeed, there does not appear any expreſs determination in this court, that it is in its own nature a ſmall tithe; it is a ſeed, and all ſeeds are mentioned as ſmall tithe, and no inſtance appears that ever any ſeed was held to be a great tithe; it is a ſeed newly introduced, and therefore there is reaſon to look upon it to be of the nature of thoſe things of a new invention, which, by the caſes cited, have always been held as minute tithes.

It is true, that clover graſs made into hay is of the nature of all other graſs made into hay, and conſequently muſt belong to the parſon, or other perſon, who is intitled to tithe hay; but it does not follow, when it ſtands for ſeed, and is made into hay, that

that the ſeed may not be ſmall tithes. Wood is a great tithe, but acorns, maſt, *&c.* are ſmall tithes. Rape-ſeed, caraway-ſeed, turnip-ſeed, muſtard-ſeed, are ſmall tithes; but if the herb be growing with other graſs, and made into hay, it would be great tithe. Vetches are great tithe if mowed or cut when ripe, but if cut green for cattle, they are ſmall tithes. Wood, acorns, &c. Herb. Vetches.

So apples and other fruits are confeſſedly ſmall tithes, but the wood of apple-trees, and other fruit trees, if cut in a year when no tithe paid of the fruit, is, as other wood for firing, great tithe; but in the year when tithe is paid of the fruit, if then felled, no tithe ſhall be paid of the wood, the fruit being looked on as the principal. Apples. Fruit trees.

And this may anſwer an objection, that it would be in the power of the occupier to make it great or ſmall tithe, and ſo favour the parſon or vicar as he pleaſed, by cutting it for hay, or letting it ſtand for ſeed; it may as well be ſaid a man may fell his apple trees the year he tithed the fruit or after, to prejudice or favour the parſon.

The caſe mentioned from Mr. *Ded*'s and Mr. *Brown*'s notes are imperfect hints of thoſe caſes; I obtained a note of them from Ch. Ba. *Ward*'s notes, which are thus:

Paſch. 1680, *Woodford* and *Standfaſt*, [which ſee in p. 59, *ante*] queſtion was whether clover ſhould pay tithe as hay, and ſhould be within a *modus* of two-pence an acre for all meadow and mowing ground when clover ſtands for ſeed, and a great quantity is produced. *Woodford* and *Standfaſt*.

Note,

Note, The court was divided; *Montague* Ch. Baron and *Atkyns*, that it ſhould be accounted hay; *Raymond* before his removal, and *Gregory*, to the contrary, and after *Weſton* inclined it was not within the cuſtom; but the plaintiff the day after the term prayed to diſmiſs his bill without coſts or prejudice; which was admitted.

Pomfret and *Launder*.

Pomfret and *Launder Wait & al'*, 8 *July* 1680, [which ſee in p. 64, *ante*] tithes of clover graſs thraſhed and made into horſe bread, and hogs fed with the ſeed, yet adjudged to be hay and tithable to the vicar who was endowed with hay, and not the impropriator, as a new and different tithe from hay.

In theſe caſes it appears the diſpute was between the impropriator and the vicar who was endowed with tithe of hay, for the ſeed of *ſainfoin* or clover (for in that the reports differ) the impropriator inſiſted it was of the nature of corn or grain, and conſequently belonged to him.

In the firſt caſe the court was divided, in the ſecond inclined, that the ſeed belonged to the vicar; ſo that, as far as the authority of theſe caſes goes, the tithe of the ſeed was decreed to the vicar; it is true the vicar was endowed of the tithe of hay; and the expreſſion of ſome of the judges was, that the ſeed ſhould go with the ſtalk, and ſhould be looked upon as hay or graſs; but ſuch expreſſions might well be uſed in favour of the vicar, who was intitled to tithe hay, in oppoſition to the impropriator's claim, who would have it taken to be of the nature of corn, becauſe horſe bread was made of it, and hogs fed with it. And therefore it would be too rigid a conſtruction of thoſe expreſſions to ſay they imported, that

that the ſeed ſhould in all caſes be reputed of the nature of graſs or hay, ſince they are apparently different; although in theſe particular inſtances, where the vicar had tithe hay, they may be reſembled to it, ſince one as well as the other belonged to him. The whole authority of theſe caſes reſults to this; that *ſainfoin* or clover ſeed is not of the nature of corn or grain; in which the court being divided in the firſt caſe, the plaintiff, finding the inclination of the court, deſired to diſmiſs his bill without coſts; which was admitted: in the ſecond caſe it appears not what determination was finally made, nor does it appear, what became of it in the entry of the Deputy Remembrancer; whether it was properly great or ſmall tithes was not at all under the conſideration of the court; and by the caſe before cited it ſeems moſt reaſonable to account it of the nature of ſmall tithe.

But in the preſent caſe it ſeems moſt evident it ſhall be ſo taken, ſince by the depoſitions in the cauſe it appears, that, for forty or fifty years in this pariſh, the vicars have received the tithe of this ſeed; and although the impropriator hath frequently hired the vicarial tithes, yet it was rarely, if ever, taken by him when he did not hold both.

The court decreed, that the ſeed of the ſecond cutting of clover was a ſmall tithe: the Lord Chief Baron *Comyns*, Baron *Carter*, and Baron *Thomſon*, were of this opinion; but Baron *Parker* ſeemed to doubt the ſeed of clover being of the nature of ſmall tithe; thought it a great tithe, as it partook of the nature of the ſtalk from whence it was taken, and becauſe of the expreſſion in the caſes cited, that the ſeed and ſtalk ſhould go together. And this opinion *Bunbury* thinks the beſt. But notwithſtanding the authority

Bunb. 344. pl. 424.

Com. Rep. 642. *Bunb.* 344. pl. 424.

authority of the caſe of *Pomfret* againſt *Launder*, [which ſee under *Trinity* Term, 32 *Car.* II.] and the reaſon of the thing, judgment was given as above.

Com. Rep. 642. But all the barons agreed in opinion, that the plaintiff's bill ſhould be diſmiſſed with coſts.

Eaſter Term, 12 Geo. II.

* *May* 17, A. D. 1739.

In the *Exchequer*.

The Aldermen and Burgeſſes of *Bury St. Edmunds*, and *Lawlence Wright*, } Plaintiffs.

Lewis Evans, — Defendant.

Preſcription *in non decimando* againſt a lay impropriator, held not good. Com. Rep. 643. pl. 270. *Bunb.* 345. pl. 425. 2 Eq. Caſ. abr. 786. a.

BILL for ſmall tithes was brought by the plaintiffs, ſetting forth, that King *James* the Firſt was ſeiſed in fee of the rectories and vicarages impropriate of the pariſhes of St. *Mary* and St. *James*, in *St. Edmunds Bury*, in the county of *Suffolk*, and of all the tithes great and ſmall belonging to the ſaid rectories and vicarages, formerly part of the poſſeſſions of the monaſtery of *Bury St. Edmunds*, in the county of *Suffolk*; that being ſo ſeiſed, by letter patent dated 1 *July*, 1 *Jac.* I. the king granted to the Aldermen and burgeſſes of *Bury St. Edmunds* and their ſucceſſors † *(inter al')* *decimas tritici, garbar'*

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* *Bunbury* ſays, *July* 2, in *Trinity* Term.

† *(Among others) tithe of wheat, corn, wool, calves, &c. and all and all manner of tithes, great as well as ſmall, belonging to the ſaid monaſtery.*

lana

lanæ, vitular' &c. & omnes & omnimodas decimas dict' monaſterio ſpectan' tam majores quam minores.

And afterwards by letters patent, dated 17 *September*, 12 *Jac.* I. the king granted to the ſaid aldermen and burgeſſes, and their heirs and ſucceſſors *(inter al')* the rectories of St. *Mary* and St. *James*, and the vicarages of the ſame churches, the advowſons, rights of patronage, *&c.* * *ac omnes & omnimod' decimas tam majores quam minores prædial', mixtas, & minutas*, to the ſaid churches, *&c. dicto monaſterio ſpectan'*.

That by indenture, 2d of *April* 1724, the aldermen and burgeſſes of *Bury* made a leaſe to the other plaintiff *Wright*, of all their tithes of corn and grain, ariſing within the ſaid town of *Bury*, in the ſaid pariſhes of St. *Mary* and St. *James*, for the term of eleven years.

And afterwards, taking notice, that, by the ſaid leaſe, the tithes of corn and grain only were demiſed, and the ſmall tithes in the ſaid pariſhes by miſtake were omitted, although they were intended to have been leaſed, and the plaintiff *Wright* the leſſee ought in conſcience to enjoy them; it was by an order of council entered in the council-book of the corporation, agreed that a bill ſhould be exhibited, in the name of the corporation or *Wright*, or both, for the recovery of the ſaid ſmall tithes, due from the defendant and others for lands by them held in the ſaid pariſhes, and on ſuch recovery, ſatisfaction ſhould be made for the ſame to the plaintiff *Wright*. That the defendant *Lewis Evans*, from the year 1724

* *And all and all manner of predial and mixed tithes, and great as well as ſmall.*

to

to the year 1734, held ſeveral lands within the ſaid pariſhes in the town of *Eury*, particularly one hundred and eighty-four acres, part of a farm called *Eldo* farm, or the old farm, which farm for the greateſt part lay in the pariſh of *Ruffham*, and only one hundred and eighty-four acres part of it lay in the pariſh of St. *Mary*, which farm was parcel of the poſſeſſion belonging to the monaſtery of *Bury St. Edmunds* in the county of *Suffolk*; that the defendant *Evans* likewiſe held in the ſaid pariſh of St. *Mary*, during the ſaid years, ſeveral lands called *Wood Went*, containing about ninety-four acres, and other lands containing about thirty-ſix acres, and other lands about nine acres, on which were ariſing yearly great quantities of corn, hay, clover-ſeed, turnips, and other ſmall tithes; whereby the ſaid aldermen and burgeſſes, or the ſaid *Wright*, became intitled to demand the ſaid tithes; and pray that the defendant may ſhew cauſe, why the defendant ſhould not make ſatisfaction for the ſame to the ſaid *Wright*; the ſaid aldermen and burgeſſes conſenting he ſhould receive the ſame; and that the plaintiffs have ſuch relief in the premiſes as the nature of their caſe in equity and good conſcience doth require.

To this bill the defendant anſwers, and admits, that he hath held the ſeveral lands in the bill during the time charged, particularly the one hundred and eighty-four acres, parcel of *Eldo Farm* or *Old Farm*, which was part of the poſſeſſions belonging to the monaſtery of *Bury St. Edmunds*, and the lands called the *Wood Went*, and the ſaid thirty-ſix acres and nine acres in the pariſh of St. *Mary*, and believes the ſeveral kind of tithes and quantities mentioned in the bill might be ariſing in the ſaid ſeveral years, but inſiſts, that he hath paid and ſatisfied to the plaintiff *Wright*

Wright for all the tithes of corn and grain growing in the ſaid years, but that no ſmall tithes were ever paid or demanded for the ſaid lands; and doth inſiſt, that as no ſmall tithes, or any ſatisfaction or compoſition for the ſame, were ever paid by or demanded from the defendant, or any perſon under whom he claims, in reſpect of the ſaid lands, or from any other owners or occupiers of lands in the ſaid town of *Bury*, after ſuch length of time and ſo long enjoyment of lands freed and diſcharged from ſmall tithes, a legal diſcharge is to be preſumed; and it muſt be neceſſarily intended the ſmall tithes by due courſe of law were aliened or releaſed to the owners of the ſaid land, by the perſons intitled to the inheritance of the ſaid ſmall tithes, though the conveyance or releaſe, or other legal diſcharge, be loſt or deſtroyed, eſpecially ſince the ſmall tithes in the ſaid pariſh of St. *Mary* are of equal value with the great tithes ariſing there.

This caſe coming on to be heard on *Thurſday* 17th of *May* 1739, the plaintiff produced the ſaid letter patent 6 & 12 *Jac.* the leaſe and order of council, and by depoſitions of *Charles Woodward* and *Francis Wright* (all which were read) proved that forty or or fifty years ſince they held lands for many years in *Bury*, or collected the tithes there, and ſmall tithes were paid by ſeveral perſons in the ſaid pariſh of St. *Mary* and St. *James*; and they had heard their fathers (who held land forty years there before their having lands there) and one *Richard Copſy*, deceaſed, declared ſmall tithes in the ſaid pariſh ought to be paid or compounded for.

On the part of the defendant it was proved by depoſitions of ſeveral witneſſes, that forty-eight or fifty years before they gathered corn in the ſaid pariſh,

pariſh, and never knew the ſmall tithe paid or demanded.

On this caſe it was inſiſted by Mr. *Beetle* and Mr. *Stankey* of council with the defendant, that the bill was not proper which demands ſatisfaction for ſmall tithes from the plaintiff *Wright* who had no leaſe of or title to them; *ſed non allocatur*; for the plaintiff ſhews the title of the corporation to great and ſmall tithes, the leaſe of the great tithes to the plaintiff *Wright*, and their intention he ſhould have the ſmall tithes, and then concluded, that the corporation, or he, are intitled to ſuch ſmall tithes; and prayed that the defendant may ſhew cauſe why he ſhould not make ſatisfaction to him for the ſmall tithes ariſing in his lands, the corporation conſenting he ſhould have them; and they pray general relief as the nature of the caſe requires, ſo that the court may, conſiſtently with the prayer of the bill, direct the defendant to account to the plaintiff *Wright* for his great tithes not ſatisfied, and to account to the corporation for the ſmall tithes, which were not comprehended in their leaſe to him, and to which therefore the corporation continues intitled, notwithſtanding it is prayed that the defendant ſhould ſhew cauſe why he ſhould not make ſatisfaction for them to *Wright*, they conſenting he ſhould have that ſatisfaction.

Then it was inſiſted by council for the defendant, that ſince there was no proof of any ſmall tithes being ever paid by the defendant (although it was proved by *Richard Micklefield* that two ſhillings had been demanded an acre for the ſmall tithes of the lands he held, part of *Elde* or *Old Farm*, and he offered eighteen-pence an acre, but afterwards he refuſed

ſuſed to pay it) and it was proved by ſeveral witneſſes they never knew ſmall tithes paid for, and that the ſmall tithes were more in value than the great tithes in the pariſh, it was inſiſted,

That in a caſe of a lay impropriator, the defendant might ſay, in bar of the demand of tithes, that no tithes had ever been paid, or demanded for theſe lands.

It is true in caſe of a rector or ſpiritual perſon no one can preſcribe againſt him in a *non decimando*; but otherwiſe it is in the caſe of a lay impropriator.

And the reaſon given in the biſhop of *Winchester*'s Caſes, 2 *Co.* 44. (that if ſuch a preſcription ſhould hold in the caſe of a ſpiritual perſon, a jury of law gentlemen would not be equal in the trial of ſuch preſcription) fails in the caſe of lay impropriators.

And although there was no expreſs determination in the point by this court, yet many judges were of that opinion; in the caſe of *Benſon* and *Olive* in this court, [which ſee under *Trinity* Term, 3 *Geo.* II.] where the bill was by a lay impropriator, the Chief Baron and another baron, were of that opinion; indeed when it was ſpoken to in 1727 and 1730, the court was divided in opinion, and ſo no decree was made.

In the caſe of *Meadly* and *Tomlins*, *Paſch.* 7 *W.* 3. the bill was by a leſſee of the dean and canons of *Windſor*, and in the caſe of *Talbot* againſt *Saman*, *Harding & al*, 1736, the plaintiff was a leſſee of the biſhop of *Litchfield* and *Coventry*, the court determined not the matter by allowing the preſcription alledged, becauſe they were in effect eccleſiaſtical perſons, being leſſees for years to ſuch as were ſpiritual perſons.

And in this caſe, though there was proof of payment of ſmall tithes by the inhabitants of St. *Mary*, yet none were paid by defendant; one witneſs indeed ſaid, he promiſed to pay for the tithes of cloverſeed; but he might apprehend that to be great tithe before the determination of the court in the caſe of *Wallis* and *Pain*; [ſee the laſt caſe] and though the one offered to pay eighteen pence in the pound, when two ſhillings was inſiſted on, upon better thought afterward, he refuſed to pay it.

And the court being earneſtly deſired to conſider the caſe, and it being a matter which might frequently come before the court, they took time to think of it till next term; and in *Trinity* Term the Chief Baron delivered the opinion of the court to the effect following:

The matter for the determination of the court may be conſidered under two heads:

Firſt, Whether a lay-man can preſcribe in a *non decimando* againſt a lay impropriator?

Secondly, Whether the defendant had made out a caſe which may intitle him to the benefit of ſuch a preſcription?

And in both theſe points the opinion of the court was for the plaintiff.

Bunb. 345. pl. 425. *Com. Rep.* 648.

As to the firſt queſtion, they think there is no foundation for ſuch a diſtinction, that the defendant may preſcribe againſt a lay impropriator any more than againſt an eccleſiaſtical perſon; which it is admitted he cannot. For,

Firſt,

Firſt, No ſuch diſtinction appears in any law book whatſoever; the rule is laid down generally, that a layman cannot preſcribe in a *non decimando*, but in *modo decimando* he may; this is ſaid by *Coke*, ſo long ago as 8 *Ed.* IV. 14. this is expreſsly reſolved in the Biſhop of *Winchester*'s caſe. 2 *Co.* 44. 1 *Rol. Abr.* 653.

The ſame is agreed in ſeveral other caſes. *Wright* againſt *Gerrard*. *Hob.* 306. *Mod.* 425. 2 *Keb.* 28, 60.

And in *Slade* and *Drake*, *Hob.* 297. it is largely deſcanted upon, and agreed by Lord Chief Juſtice *Hobart*, to be a ſettled principle of law.

So *Seld. de decimis*, ch. 13. *f.* 2. 3 *vol. f.* 1279. who was not thought averſe to the privileges of laymen in the enjoyment of tithes, after an account given of the infeodations of tithes to laymen, which, by the laws of *France* and *Spain*, were ſtill allowed, concludes, that infeodations were in *England* as in other ſtates, but of latter times none are allowable, derived from other original than the ſtatute of diſſolutions; that diſcharge by preſcription of paying no tithes, or any other thing in lieu of them by later canon law, ſince the parochial right eſtabliſhed, is allowed only to ſpiritual perſons, but to no layman, the laity being incapable of tithes by pernancy; as alſo, of diſcharge by bare preſcription, ſaving in caſes within the ſtatutes 31 *H.* VIII. chap. 13.

And the reaſon given in the books, why a layman cannot preſcribe in a *non decimando*, is, becauſe a layman, ſince the parochial right eſtabliſhed, is incapable of tithes in pernancy; ſo ſaith Lord *Coke*, 2 *Co.* 44. as well as Mr. *Selden ſupra*; and conſe-

quently, as he cannot take a grant of tithes to himſelf, unleſs upon a conſideration paid for them as upon a real compoſition by parſon, patron, and ordinary, or by a *modus* given in lieu and ſatisfaction, ſo he cannot be diſcharged from the payment ment of them; for a real compoſition ſhall not be intended unleſs it be ſhewn.

It has indeed been objected, that there is no foundation for a layman to be excluded from the benefit of ſuch a preſcription, ſince there is no incapacity in him to take ſuch a grant; and therefore it is hard that time, which eſtabliſhes a right in other caſes, ſhould weaken his right in reſpect to his diſcharge from the payment of tithes, and conſequently he ſhall have no advantage from a real compoſition, unleſs he can produce it, which in length of time may, as well as other grants, be loſt; and yet in other caſes where there has been an immemorial uſage to pay or be exempt, ſome grant ſhall be preſumed originally made, to warrant it.

But this will not appear altogether ſo hard, if it be conſidered, that when the parochial right became eſtabliſhed, and tithes were the fixed and ſettled revenue of ſpiritual perſons only, a grant of them to any other perſon was void, unleſs made upon a valuable conſideration, ſo that there was *quid pro quo*; as was the caſe of a real compoſition or *modus decimandi*; it was void, not from any incapacity in the grantee to take, but from the impropriety of the thing granted, which being appropriated to ſpiritual perſons, as their proper and peculiar maintenance, could not be given to a layman; that this was ſo, appears by an epiſtle of Pope *Innocent* the Third, in the body of the canon law, *lib.* 3. *tit.* 30. *ca.* 29. *de Dec.*

Dec. where it is ſaid * *Perceptio decimarum ad eccleſias parochiales, de jure communi pertinet,*" and *Lind.* ſpeaking of portions of tithes which a perſon might preſcribe to have in the pariſh of another, ſaith, † *Portiones potuerunt perveniſſe ad locum religioſum de conceſſione laici, &c. de decimis vel proventibus quos laicus talis habuit ab eccleſiâ aliâ in feudum ab antiquo, hoc verum eſt, ſi tales portiones decimarum eis donatæ fuerunt ante conſilium Lateran' celebrat' anno* 1130. *temp. Alex.* 3. *Nam ante illud concilium potuerunt laici decimas in feudum retinere, non tamen poſt tempus dicti concilii.*

And the canon law of that council runs, § *Prohibemus ne laici decimas cum animarum periculo detinentes, in alios laicos poſſint transferre, ſi quis vero receperit, et eccleſiæ non reddiderit, Chriſtianâ ſepulturâ privetur.* Cod. 691.

Hence it is manifeſt, that it was not thought a layman was incapacitated to be the pernor of tithes, from any incapacity in his perſon, but from the nature of the thing granted, which being eſteemed in thoſe days, as the peculiar revenue of the church, and laymen being under ſo ſevere penalties prohibited to hold them, it is no wonder the common law, which in many inſtances

* *The taking of tithes belongs to pariſh churches, of common right.*

† "*Portions of tithes might belong to religious places, by grants of the laity, &c. of tithes or profits, which ſuch laymen anciently had from another church, in fee; which is true, if ſuch portions of tithes were given to them, before the celebration of the council of* LATERAN, *in the year* 1130, *in the time of* ALEXANDER *the* THIRD." For the laity might retain tithes in fee before, but not after that council.

§ *Laymen detaining tithes, at the hazard of their ſouls, are forbid to aſſign them to other laymen; but if any perſon reſerves them to himſelf, and does not reſtore them to the church, he ſhall be deprived of Chriſtian burial.*

and canons of *Windsor*, and leſſee of the Biſhop of *Coventry* and *Litchfield* (though laymen) had decrees for the tithes, although a conſtant nonpayment was inſiſted on; and what difference can there be in the reaſon of the thing, between a lay leſſee and a lay impropriator, if the preſcription is allowable only, becauſe he is a layman, and not an eccleſiaſtical perſon.

There are two caſes, of which my brother *Parker* hath given himſelf the trouble to get copies; they may be fit to be conſidered on this queſtion.

The firſt is the caſe of *Medly* and *Talwy*, *Paſch.* 7 *Will.* II. [which ſee *ante* 81.] wherein the plaintiff, as leſſee of the rectory of *Leominſter*, in cõm' *Suſſex*, exhibited his bill againſt the defendant for tithe of corn and grain growing on his land in the ſaid pariſh, and ſuggeſting, the defendant pretending his lands were exempted from the payment of tithes, refuſed to diſcover how they were ſo diſcharged. The defendant, by anſwer, inſiſts, that his father, in the year 1652, purchaſed the lands in defendant's occupation, of one *William Cooper*, of *Maidſtone* in *Kent*, which in the purchaſe deeds were mentioned to be free from the payment of tithes, and conveyed as ſuch; but the ancient deeds are loſt or miſlaid, ſo that he cannot ſet forth by what ways or means they are exempt. The cauſe coming to be heard before Chief Baron *Ward*, and *J. Litt. Powis*, then Barons, on reading the purchaſe deed 1652, and great debate, the court thought not fit to decree for the plaintiff without a trial, and propoſed an action ſhould be brought on ſtatute 2 *Edw.* VI. chap. 13. which the plaintiff declining, the bill was diſmiſſed, by conſent, without coſts.

It is probable the defendant had a legal exemption, which the plaintiff was conſcious of, but thought to take advantage of the loſs of the defendant's deed, whereby he was diſabled to make it out; but the court, not favouring his deſign, choſe to diſmiſs his bill, without coſts.

The ſecond caſe brother *Parker* hath copied out, was the mayor, aldermen, and burgeſſes of *Warwick*, againſt *Lucas*, *Trin.* 9 *Anne*, and heard 5 *July*, 1710. The plaintiffs ſued as impropriators of the rectory of St. *Mary* in *Warwick*, for the tithes of two cloſes called the *Upper Fryers*, the defendant admitted the plaintiffs intitled to the rectorial tithes in the pariſh, except thoſe two cloſes, which he inſiſted were the ſite of the manſion-houſe of the late diſſolved friers preachers in the town of *Warwick*, which came to the crown by the diſſolution of the ſaid houſe, and were freed from the payment of tithes by virtue of ſome preſcription, bull, order, or other lawful means, and had ever ſince been held free from payment of tithes to the rector or vicar; and that the monaſtery, being a ſpiritual corporation, were capable of being diſcharged by preſcription; and upon debate the bill was diſmiſſed by the court, with the plaintiff's conſent, with moderate coſts,

In theſe two caſes it does not indeed appear directly, whether the defendants could make out a legal diſcharge, or not; it was probable they could; and the plaintiffs thought it ſo probable, that they cared not to try that point, but conſented the bill ſhould be diſmiſſed; but they are far from ſhewing the opinion of the court, that a bare preſcription could be ſet up againſt a lay impropriator, any more than an eccleſiaſtical perſon; for, if ſo, the bills ought

ought to have been diſmiſſed with coſts, without more ado; but as where an eccleſiaſtical perſon ſues, if the defendant has a probable ground of diſcharge, it is not proper to decree againſt it, without putting it into a way of examination, which the court ſeemed willing to do in theſe caſes; but the reſpective plaintiffs, doubtful of the iſſue, choſe rather the bill ſhould be diſmiſt.

But for the clear illuſtration of this point, it may not be improper to conſider in what caſes a defendant may be diſcharged by preſcription, and in what not.

Where any man occupies lands, which came to the crown by the diſſolution of religious houſes, by virtue of the ſtatute 31 *Hen.* VIII. chap. 13. or ſtatute 32 *Hen.* VIII. chap. 24. it is manifeſt he may inſiſt upon a diſcharge by preſcription; for ſince the religious houſes diſſolved by thoſe ſtatutes (being eccleſiaſtical bodies) were capable of diſcharge by bull, order, or preſcription, the patentees of any part of the poſſeſſions belonging to any of thoſe houſes are enabled by a ſpecial clauſe in the acts to enjoy the ſame, acquitted and diſcharged of the payment of tithes, in as full and ample a manner, as the eccleſiaſtical perſon enjoyed them, at the time of ſuch diſſolution, *&c.*

And by the ſtatute 2 *Edw.* VI. chap. 13. no perſon ſhall be compelled to pay tithes for any lands, *&c.* which by the laws and ſtatutes of the realm, or by any privilege or preſcription, are not chargeable with the payment of them.

Secondly, A ſpiritual perſon, or the King, who is *perſona ſacra*, being capable of tithes in pernancy,

nancy, is capable of preſcribing to be diſcharged of the payment of tithes.

That a ſpiritual or eccleſiaſtical perſon may ſo preſcribe, is reſolved in the Biſhop of *Winchester*'s caſe, 2 *Co.* 44. *Cro. Eliz.* 511. ſo it is in *Richard* Biſhop of *Lincoln*'s caſe, *Cro. Eliz.* 216. 1 *Roll.* 264. *Mod.* 435, 618. *Yelv.* 2. *Cro. Eliz.* 785. *W. Jon.* 368.

That the King may likewiſe preſcribe in a *non decimando*, appears, 22 *Aſſ.* 25. 10 *Hen.* VII. 18. *Mod.* 483. *Sti.* 137. *W. Jon.* 387. *Hetl.* 60. and in many other books.

But I know not that it has been allowed in any other caſes.

It was inſiſted on in the caſe of *Sidowe* and *Holmes*, *Cro. Car.* 422. *W. Jon.* 368. 1 *Roll. Abr.* 654.

Plaintiffs in prohibition ſurmiſed, that the prior of *Briſtol* was ſeiſed in fee of lands in his poſſeſſion, and he and his predeceſſor, time out of mind till the diſſolution of the priory, by ſtatute 27 *Hen.* VIII. chap. 20. held them diſcharged of the payment of tithes, and by patent the lands came to *Edward Battel*, and to the plaintiff as his leſſee, and it was inſiſted, that the prior being capable of tithes, and of being diſcharged by preſcription, the plaintiff ought to have the benefit of the diſcharge; but by three judges it was reſolved, that the prior, being capable of diſcharge by privilege, as well as by grant or compoſition, it ſhall not be intended to be a diſcharge by compoſition, but rather by privilege, which was the general courſe of exemption, which privilege was gone by the diſſolution, and conſequently

intended without ſhewing it ſpecially, and then the grantee of the crown cannot be diſcharged; and in caſe the grantee of the King cannot preſcribe in a *non decimando*, although he claims under the crown, which was exempted by preſcription from the payment of tithes, it may be juſtly inferred, that he cannot do ſo in any other caſe; and that the law will not allow any perſon to preſcribe in that manner, unleſs it be a perſon eccleſiaſtical or ſacred, as the King is, who was enabled to hold tithes in pernancy, or unleſs he be within the exemption created by the ſtatutes 31 *Hen.* VIII. chap. 13. or 32 *Hen.* VIII. chap. 24.

By the words of the anſwer, it looks as if ſome ſtreſs was laid upon the pariſh being exempt in this caſe; for the anſwer ſays, that no ſmall tithes, or any ſatisfaction or compoſition for the ſame, were ever paid by or demanded from the defendant, or any under whom he claims, or from any other owners or occupiers of lands within the town of *Bury St. Edmunds*; but the counſel for the defendant did not inſiſt upon this, nor indeed could they with any colour do ſo; for beſides, that it appears by the depoſitions in the cauſe, that ſmall tithes had been paid by ſeveral of the inhabitants there, it was reſolved in the caſe, *Hicks* and *Woodſon*, *T.* 6. *W. & M.* 4 *Mod.* 336. *Carth.* 392. *Salk.* 655. *Skin.* 560. that a cuſtom to be exempt from the payment of tithes could not be alledged in an hundred, much leſs in a pariſh; but it muſt be in a county or in *pais*, ſuch as the wild of *Kent*, and there only for things not due of common right, as for wood, *&c.* and therefore cuſtom alledged in the hundred of *Huntſpill* to be free from tithes for the agiſtment of barren cattle, was after a verdict for the plaintiff, which found the cuſtom

tom held to be a void cuſtom, and conſultation was awarded, which was a farther authority in confirmation of the general maxims of law, that a layman cannot preſcribe in a *non decimando*.

Thirdly, Another reaſon may be given for the diſallowing the defence ſet up for the defendant in the preſent caſe, in that the defendant does not alledge any particular ground of diſcharge, but only ſaith, that no ſmall tithes were ever paid or demanded for his lands, and therefore after ſuch length of time, and ſo long enjoyment of lands free from payment of tithes, a legal diſcharge muſt be preſumed, and it muſt neceſſarily be intended the ſmall tithes were aliened or releaſed to the owners of the land, by the perſons intitled to the inheritance, though the conveyance, or releaſe, or other legal diſcharge, be loſt or deſtroyed.

I agree, that, in courts of equity, the ſame formality is not required, as in pleadings at law; but the ſubſtance of the matter alledged for exemption of the defendant, ought to be ſhewn with ſo much certainty at leaſt, as the court may ſee what is inſiſted on, and direct the ſame to be tried or examined. In caſe a preſcription is relied upon, the defendant ought to alledge the preſcription in ſuch a manner as that it may be tried. In this caſe the defendant does not ſo much as ſay, he is excuſed by preſcription: he ſays, indeed, no ſmall tithes were ever paid or demanded, which may be evidence of a preſcription; but in all caſes where a preſcriptive right is inſiſted on, that is the matter which muſt be tried; and can the court direct a trial of what is not alledged, or where that only is alledged that may be ſome proof of it, or whence it may be inferred? much leſs,

leſs, whether any legal diſcharge generally, or whether any conveyance, releaſe, or other legal diſcharge; an iſſue muſt be upon a ſingle point, not a matter complicated, confuſed or multifarious.

In the caſe of *Priddle* and *Napper*, 11 *Co.* 9. where the defendant in prohibition traverſed the preſcription alledged, inſtead of the unity of poſſeſſion, which was the ground (if any) the plaintiff had to excuſe himſelf from the payment of tithes, it was held to to be ill; for he ought to have traverſed the unity *ratione, &c.* as he was diſcharged, and conſequently his plea was inſufficient.

In *Slade* and *Dick*'s caſe, *Heb.* 294. it is ſaid, that the diſcharge of tithes being againſt common right, he muſt plead it with its grounds and reaſons ſpecially. It is true, a ſpiritual perſon, being capable of diſcharge by preſcription, might alledge the preſcription generally, without aſſigning any reaſon for ſuch diſcharge; but here is no preſcription directly inſiſted on, which could be ſent to a trial.

Many caſes might be cited to ſhew the impropriety of ſuch pleadings; but it is leſs needful, ſince the matter, if it had been more properly inſiſted on, had been inſufficient.

The ſecond queſtion, whether, by any thing elſe appearing in the caſe, the defendant may excuſe himſelf from the payment of tithes; for it was urged, that there being an unity of poſſeſſion in the abbot who had the rectory, and *Eldo Farm* in fee, and conſequently the defendant ought not to be diſcharged for ſmall tithes of one hundred and eighty-four acres, part of that farm; but how does this unity of poſ-

ſeſſion

ſeſſion appear? All the proof offered for it is, that the plaintiff makes title to the rectory and vicarage of St. *Mary*, and all tithes predial, mixt and minute, *monaſterio de* Bury St. Edmund *nuper ſpectan'*; that by a roll out of the augmentation office, it is ſaid, that 4th *November*, 31 *Hen.* VIII. the abbot and convent of *Bury* ſurrendered to the King the monaſtery and church of *Bury*, and all manors, meſſuages, lands, tithes, rectories, vicarages, &c. belonging to the ſaid monaſtery; that 10th *July*, 37 *Hen.* VIII. the Duke of *Norfolk* accounted to the crown for the manor of *Old Haw*, *Hoe* and *Ruſtham*, part of the poſſeſſion of the monaſtery of *Bury St. Edmund*, reſigned to the King, and by him granted to the Duke of *Norfolk*, and valued at 21 *l.* 17 *s.* 4 *d. per annum.*

Now it does not appear, that *Elde Farm* was part of the manor of *Old Haw*, nor is it ſo much as averred by the anſwer; there is nothing to induce a probability of it, but an imagination, that *Elde* may be a corruption of *Old Haw*, which is a thing merely imaginary, and deſtitute of all proof; but admitting it really was, not only that ought to have been expreſsly alledged in the anſwer, but it ought likewiſe to have been ſhewn, that the abbot and convent had been ſeiſed of the rectory and lands, *ſimul & ſemel*, time out of mind, and continued ſo ſeiſed till the diſſolution; for, according to *Priddle* and *Napper's* caſe, 11 *Co.* 14. b. every unity that amounts to a diſcharge from the payment of tithes, by virtue of the ſtatute 31 *Hen.* VIII. chap. 13. ought to have four qualities: 1. It ought to be rightful, and not commence by wrong. 2. It ought to be equal, that is, the abbot and convent ought to be ſeiſed of the rectory and land both in fee. 3. It ought to be perpetual, having continuance, time out of mind.

4. It ought to be conſtantly free from payment; for if the tenants for years or will under the abbot and convent ever uſed to pay tithes, the unity will not avail.

And Lord *Hobart* adds a fifth quality; it muſt have conſtant continuance in the ſame body, elſe it is of no force, *Wright* and *Gerrard*, *Hob.* 310, 311.

And the ſame qualifications have been agreed and confirmed by many ſubſequent reſolutions and authorities.

Now if the defendant had by his anſwer inſiſted, that there had been ſuch an unity of poſſeſſion in the abbot and convent of the rectory or vicarage of St. *Mary* and of *Eldo Farm*, the plaintiff might have been able to prove that *Eldo* and *Old Haw* were not the ſame eſtate, that *Eldo Farm* was never in the abbey and convent; nor does the defendant inſiſt or make out, that he derives his title to that farm under the Duke of *Norfolk*; that the rectory was appropriate within time of memory; that the leſſees paid tithes, or that the eſtate was in leaſe at the time of the diſſolution, in which caſes theſe lands would not be diſcharged by the ſtatute, *vide Cro. Eliz.* 584. *Mod.* 528. 2 *Bulſtr.* 6. 66. *Jon.* 412. and for theſe reaſons the court decreed the defendant to account for the ſeveral matters prayed by the bill.

Bunb. 345. pl. 425. The court alſo declared, that the preſumption that ariſes from a conſtant non-payment, would not be ſufficient, unleſs the defendant could ſhew, either that the lands were parcel of one of the greater abbies, or that ſome of the impropriators had releaſed the tithes.

See

See the caſe of Lady *Charlton* againſt Sir *Blunden Charlton*, under *Hilary* Term, 6 *Geo.* II.

Hilary Term, 13 Geo. II.

February 21. A. D. 1740.

In *Chancery*.

Philip Lord *Hardwicke*, Lord Chancellor.

The Honourable *John Verney*, Maſter of the Rolls.

The Archbiſhop of *York*, and Doctor *Hayter*, againſt Sir *Miles Stapleton*, and others.

Bill by leſſee of a rectory for three lives, who had made a derivative leaſe, for tithe in kind, and to eſtabliſh a cuſtom, of ſetting out corn in ſtooks, is properly brought, though the tithes are out in leaſe, as ſuch a bill prevents colluſion between the leſſees and occupiers 2 *Tr. Atk.* Rep. 136. pl. 122.

THE Archbiſhop of *York* was intitled, *in right of the church*, to the rectory of *Mitton* in *Yorkſhire*; and in 1733 granted a leaſe for three lives to Archdeacon *Hayter*, who made a derivative leaſe to one *Taylor*; and this bill is brought by the archbiſhop and Doctor *Hayter* for an account of tithes in kind, and to eſtabliſh the cuſtom of ſetting out the corn in ſtooks or ſtacks.

It was objected, that there is no foundation for this bill, becauſe doctor *Hayter*, having made a leaſe to *Taylor*, is not intitled to any account, and cannot maintain a bill to eſtabliſh a cuſtom of ſetting out in ſtooks or ſtacks, which is a mere right.

Lord Chancellor.

I am of opinion, the bill to eſtabliſh the cuſtom is well brought; and that the parſon, who is intitled

to the inheritance, is properly made a party, notwithſtanding the tithes themſelves were out on leaſe at the time for which the account is prayed; for otherwiſe it might introduce great inconveniencies, by a colluſion between the leſſees and the occupiers; and that a bill may be even brought, without praying an account, to eſtabliſh a mere right only, appears from the common caſe of bills for eſtabliſhing *moduſes*, and therefore ſhall direct an iſſue to try the cuſtom of the ſtacks or ſtooks.

The courſe of proceeding in the court of *Exchequer*, is to decree an account of tithes from the filing of the bill, but it will be time enough, when the cauſe comes back after trial, to ſearch for precedents here, in title bills, though I know the rule of this court in general is, where an account is directed, that it ſhall be carried down even to the time of the maſter's report, and not to the filing of the bill only.

To what time account to be carried down to, in *Chancery*.

The plaintiff could not properly amend his original bill, by filing new matter, which has ariſen ſince the original bill, but ought to have brought a ſupplemental bill; but then the defendant ſhould have taken advantage of this defect in form, by a demurrer, and is too late to make the objection after he has anſwered.

Defendant muſt take advantage of defects in form by demurrer, it is too late after anſwer.

Next, with regard to matter of right, as to lands for which an exemption is inſiſted on, againſt a demand for tithes in kind, though the charge in the bill is general, yet in the anſwer you muſt ſhew the particular exemption of the particular cloſes, which is not done in this caſe.

The queſtion of right is upon an exemption claimed of all the lands that did belong to the monaſtery

of St. *Mary*, in the neighbourhood of *York*, which was one of the greater abbies diſſolved by ſtat. 31 *Hen.* VIII. chap. 13.

It is certain they are diſcharged in the hands of the crown, and their grantees in the ſame manner they were in the hands of the monaſtery at the time of the diſſolution, but the evidence of this exemption depends upon uſage; now it has been very rightly ſaid, that a poſterior uſage is evidence of the antecedent, and has been always allowed ſo in caſes of this nature, for what other evidence can be had?

Evidence of an exemption depends on uſage, and the poſterior is evidence of the antecedent, for no other can be had.

It has been objected, that there has been unity of poſſeſſion of the lands and tithes, in the *Stapleton* family, and that occaſions the obſcurity, and accounts for the *non* payment of tithes; but the ancient leaſe produced by the defendants, where there is a covenant, that one of the anceſtors of this family ſhall hold tithe free, is an anſwer to this objection.

It is very natural to think that the denomination of "*tithe acres*" aroſe firſt from thoſe acres being ſet apart from the reſt, in lieu of tithes; and it is a ſtrong circumſtance in favour of the defendants, to ſhew that this meadow is exempt from tithes.

It has been ſaid, and very rightly, a *modus* to take part of the tithes for the whole, could never have been at any time a ſatisfaction for the whole, and has always been held a void cuſtom. But in this caſe it is impoſſible to ſay, whether three hundred years ago five acres might be a ſufficient compoſition for the tenth part of the whole; and therefore the objection fails, as to the inequality between five acres and two hundred.

Modus to take part of the tithes for the whole, has always been held a void cuſtom.

There are ſo many obſcurities, that the court cannot determine clearly, without directing a trial at law, for a jury will have much better opportunities of unravelling this difficulty from a view of the lands themſelves, and the boundaries, *&c.* will effectually quiet this queſtion.

Firſt iſſue, as to the manner and method of tithing.

Second iſſue, as to the exemption.

Third iſſue, as to the real compoſition.

Michaelmas

Michaelmas Term, 13 Geo. II.
A. D. 1740.

In the *Exchequer*.

Sir *Edmund Probyn*, Lord Chief Baron.
Sir *Lawrence Carter*.
Sir *James Reynolds*.
Sir *Thomas Abney*.

Sir *Dudley Ryder*, Attorney General.
Sir *John Strange*, Solicitor General, and Recorder of *London*.

John Rudge and *James Hopkins*, — Plaintiffs.

Robert Chapman, Clerk; *Robert*, Biſhop of *Peterborough*; *John Hopkins*, *Chriſtopher Hopkins*, and thirty-three inhabitants of *Braybrook*, in the county of *Northampton*, — } Defendants.

Bill to eſtabliſh a *modus* when proper. *Com.* Rep. 697. pl. 275.

A Bill was exhibited by plaintiff, ſetting forth that the plaintiff *Rudge* and *John Hopkins* deceaſed, were ſeiſed in fee of certain lands, lately purchaſed by them in the ſaid county, without any benefit of ſurvivorſhip; that they were ſued by the defendant as rector of the pariſh of *Braybrook*, for the tithes of the ſaid purchaſed lands; who by anſwer inſiſted, that *Robert Chapman*, the plaintiff in that cauſe, held and enjoyed a parcel of meadow land, called "*The Dale*," in lieu of all tithe hay ariſing upon the ſaid purchaſed lands.

That after iſſue, and examination of witneſſes, the cauſe was brought to hearing 4 *Nov.* 1731, and on hearing, the plaintiff's bill was diſmiſſed with coſts.

That *John Hopkins* by will, 10th of *Nov.* 1729, deviſed his moiety of the purchaſed premiſes to the plaintiff *J. Rudge*, *James Hopkins* and Sir *Richard Hopkins* and their heirs, upon certain truſts therein mentioned that the plaintiff *John Rudge* refuſing to act, by decree in *Chancery* releaſed to the other truſtees, and Sir *Richard Hopkins* is ſince dead, whereby the plaintiff *James Hopkins* is become the only ſurviving truſtee of the will of *John Hopkins*.

So the bill prays that this *modus* may be eſtabliſhed by the decree of the court.

It was not proper to pray ſuch decree, becauſe the plaintiffs have not made proper parties; *Firſt*, the *modus* alledged is, that the rector enjoyed all the meadow called *Dale*, in lieu of all the tithe hay ariſing in that pariſh, and all the land-owners of that pariſh are not made parties. *Sed non allocatur*; for *Hawkins* and the thirty-three other defendants are named to be the land-owners of that pariſh, and although it is not ſaid they were all the land owners *non conſtat* there are many others, and if there ſhould be, they cannot be bound by the decree, and it ſhall not be intended, unleſs it had appeared.

Secondly, it was ſaid that *Rudge* is intitled to an undivided moiety of the purchaſed lands, and the other plaintiff is only the ſurviving truſtee of the other moiety, but upon what truſts, does not appear, and the *ceſtui que truſt* is not before the court.

To

To which it was anſwered, the plaintiff is truſtee for perſons not *in eſſe*, and it was declared in the Houſe of Lords by Lord *Hardwicke*, that perſons not *in eſſe* might be bound by a decree; that it had been ſettled lately in *Chancery* upon Mr. *Hopkins's* will, that till the *ceſtui que truſt* appointed by the will ſhould be *in eſſe* the eſtate deſcended to the heir at law, who was made a defendant, and did not oppoſe the decree; and being defendant, though no decree can be for him, yet it would be miſchievous if any refuſing to be plaintiff, ſhould hinder him that hath a joint intereſt with him for ſuing for his right; and it was therefore always thought ſufficient to name him a defendant, as he was in this caſe; but of this the court took time to conſider. Lord *Hardwicke*.

It is to be obſerved, that the plaintiff comes for a favour, not for the recovery of a right; if the plaintiff ſhould ſue for tithes in *ſpecie* again, the plaintiff might bar his demand by the ſame means as before, as it is unlikely the defendant ſhould again attempt an unſucceſsful ſuit.

Bills of peace are proper in equity, but it is were the right has been ſettled at law by a trial, and appears to be on a good foundation. Bills of peace.

Secondly, It does not appear by that bill what intereſt the parſon hath in the meadows of *Dale*, whether he and his ſucceſſors were to enjoy it.

Thirdly, That the plaintiff is intitled to a moiety only of the eſtate claimed to be exempt.

Trinity

Trinity Term, 15 Geo. II.

July 21, A. D. 1742.

In *Chancery*.

Philip, Lord *Hardwicke*, Lord Chancellor.
William Forteſcue, Maſter of the Rolls.

Smith againſt *Wyatt*.

Held, upon a bill brought by a rector for potatoes ſown in great quantities in a common field, that they being in their nature a ſmall tithe, the ſowing them in greater quantities makes no alteration.
2 *Tr. Atk.* Rep. 364. pl. 242.
5 *Bac.* Abr. 69.

THE bill was brought by the rector of a pariſh in *Eſſex*, for the tithes of potatoes ſown in great quantities, in the common fields, and therefore claims them as a great tithe.

The defendant the vicar inſiſts, that notwithſtanding the potatoes are ſown in fields, they ſtill continue a ſmall tithe, and the quantities make no difference.

Mr. * *Clarke* for the plaintiff cited ſeveral † authorities, in order to ſhew that the quantities made a difference; and that when potatoes are ſown in gardens, they are a ſmall tithe, and when in fields a large tithe.

The caſes by defendant's counſel to prove them a vicarial tithe, were *Parry* againſt the Biſhop of *London*, *Hilary* Term, 1705. *Wallis* againſt *Pain*, and others, *February* 8, 1708. [which ſee under *Hilary* Term, 12 Geo. II.]

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* Afterwards Maſter of the Rolls. See the *Nomenclature* of *Weſtminſter-hall*, at the end of the Biographical hiſtory of the late Sir *William Blackſtone*, p. 11. edit. octavo, 1782.

† *Hut.* 77. *Cro. Car.* 28. *Wharton* againſt *Liſle*. 3 *Lev.* 365. 4 *Mod. Carth. Degg's* Parſon's Counſeller, 177.

The

The Attorney General ſaid, It would be a great inconvenience to the people of *England*, if the rule which is laid down for the plaintiff, ſhould be eſtabliſhed, that quantity will denominate potatoes to be a great tithe.

Lord Chancellor.

The queſtion is, Whether potatoes planted in fields, are great or ſmall tithes?

Potatoes in their nature are ſmall tithes; then the queſtion will be, Whether they receive any alteration of their right, by cultivating them in greater or ſmaller quantities?

The probable foundation of the firſt diſtinction between great and ſmall tithes.

When the diſtinction of great and ſmall tithes was at firſt ſettled, probably it was upon this foundation, that the former yielded tithes in greater quantities, and the *ſpecies* of tithes, which were called ſmall, produced but in ſmall quantities.

Though it might be arbitrary at firſt, yet it has grown into a rule, and fixed ſo, for the ſake of certainty; nor is there any authority cited, where it is ſaid to be determined, that the rule of tithe ſhould depend upon quantity, and not upon the nature.

Though Lord Chief Juſtice *Holt* held that it ſhould be determined whether tithes be great or ſmall, from their quantity, yet the judgment of the court was contrary.

In the caſe of *Udal* and *Tindal*, *Cro. Car.* 28. and in *Hut.* 78. it is ſo laid down indeed, but there was no judicial determination; and in *Wharton* againſt *Liſle*, 3 *Lev.* 365. and 12 *Mod.* 41. Lord Chief Juſtice * *Holt* did hold that the tithes ſhould be determined, whether

* Thoſe Judges who have grounded their opinions, upon the queſtion, what is, or is not to be eſteemed great or ſmall tithe, by conſidering whether

whether great or ſmall, from their quantity, and not their nature, but the judgment was contrary.

If potatoes in gardens ſhould be deemed ſmall tithes, and great in fields; it would produce the utmoſt confuſion, as it would vary every year, in every parish.

If this ſort of root ſhould be called ſmall tithes, when planted in gardens, and great when planted in fields, it would introduce the utmoſt confuſion, and muſt vary every year, in every pariſh.

If the quantity will turn ſmall tithes into great, why will it not turn great tithes into ſmall, when the quantity of great tithes is but ſmall.

An objection has been made, that if this rule ſhould hold, *it would put it in the power of the occupier to change the property.*

When arable land is turned into paſture, it

To which I anſwer, *ſo it will*, for tithes are a fluctuating uncertain inheritance, and depend upon the

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whether the thing to be tithed has one ſtalk or two ſtalks, a long one or a ſhort one, or whether it be called herb, graſs or grain, have been lawyers of no parts, ſuch as knew not how to diſtinguiſh words from things; *but my Lord Chief Juſtice Holt* always regarded the principal or original intention of endowments, they being the ſole ground of a vicar's title to tithes, and from thence formed the reaſon of his judgment, and not from the ſhape of the land, or the colour of what it produced; he knew it was originally intended by the grant, that the vicar was to have ſmall tithes only, that is a ſmall portion of the tithes, for his labour, and not the tithe of what occupied the principal part of the pariſh, whereby the benefit of the rector would be transferred to the vicar; and therefore Lord Chief Juſtice Holt pronounced his judgment to be, that when hemp, flax, hops, &c. were planted in large fields, they were to be eſteemed *great tithes*, though in orchards or gardens they might be taken for *ſmall tithes*. This is a judgment founded on the only ground reconcileable to any ſenſible idea. See Introd. xxvii, xxviii.

the courſe of huſbandry; for a man may turn arable into paſture, and then the tithe being agiſtment, is become a ſmall tithe from a great one.

is an agiſtment tithe, and become a ſmall one from a great one.

Therefore, I think, as there is no judicial determination againſt this, I am warranted in my opinion, that the tithe of potatoes is a ſmall tithe, and his lordſhip decreed accordingly.

5 *Bac.* Abr. 72. pl. 22. S. C. S. P.

Michaelmas

Where there are two ancient corn mills in the ſame pariſh, which paid tithes, and another miller, who had a fulling-mill, covered with a *modus*, turned it into a corn-mill, the mill ſo converted ſhall pay tithe.

Suppoſe two ancient mills in the ſame pariſh, which paid tithes in kind, and another miller, who had a fulling-mill, covered with a *modus*, ſhould turn it into a corn-mill, it would prejudice the perſon in the other mills, as the new erected one would diminiſh the trade of three mills, and the perſon ſuffering by thoſe means, ought to be recompenced by the payment of the tithe for the mill ſo converted.

The reaſon the caſes go upon, why a *modus* is deſtroyed, where two ſtones are erected inſtead of one, is, becauſe the miller can grind a double quantity.

Where there are two fulling-mills, and a corn-mill under the ſame roof, and the former are turned into two corn-mills, they thereby become two new mills.

Conſider it in another light: Formerly there were two fulling-mills, and a corn-mill, under the ſame roof, and the fulling-mills are now turned into two new corn-mills; this is juſt the ſame thing, as if defendant had erected two new mills.

A fulling-mill pays only a perſonal tithe; corn-mills each a tenth diſh.

The fulling mills can only pay a perſonal tithe, becauſe it is only in nature of a trade, but when there are corn-mills, each is to pay a tenth diſh.

In this caſe, thus much muſt be ſhewn, that there was a cuſtom in this pariſh for fulling-mills to pay tithes, or otherwiſe they do not properly pay them.

The only colourable thing is, it was an ancient *modus* for the land, and that the mill is but an accidental quality.

But it is not pleaded for the land only, but as a conjunct *modus* for land and mill too, and therefore let the plea be over-ruled.

Michaelmas

Michaelmas Term, 17 Geo. II.

November 17, A. D. 1744.

In *Chancery*.

Colegrave againſt *Juſon*.

THE plaintiff brought his bill for tithe of grain in kind; the defendant inſiſted upon a compoſition of one quarter of rye, and one of oats in lieu of it; a trial at law was directed, and a verdict found for the *modus*.

The plaintiff inſiſts now upon a new trial, on the diſcovery of an old deed in the chapter houſe at *Weſtminſter*, which he called the record of a cauſe determined before the pope's delegate, in which it was decreed, that revenues, which had been alienated, ſhould be reſtored to this church, and concludes, that the tithes were comprehended under the word *revenues*; the judge at the trial refuſed to admit it as evidence.

Lord Chancellor.

There is no foundation to grant a new trial, for if I ſhould, it would be a precedent to overturn the rights of men upon very uncertain grounds.

I am afraid this is a caſe where *prowling* in an office has ſpirited up the rector to diſpute *this modus*; it happens very unfortunately for ſuch perſons, that they ſtumble upon papers, which they fancy are evidence of *tithes in kind*.

This is nothing more than a proceeding in ſome eccleſiaſtical court, what *non conſtat* found: Firſt, in

D d the

The diſcovery of an old deed in the chapter houſe at *Weſtminſter*, ſet up as a decree of the pope's delegate, that the *revenues* of the church, which had been alienated, ſhould be reſtored; that tithes were comprehended under the word *revenues* therein, is not a foundation to grant a new trial, after a verdict had on an iſſue directed to be tried at law, a compoſition of a quarter of rye, and one of oats, in lieu of tithe in kind being ſet up to a bill brought for the ſaid tithe. 3 *Atk.* 197. pl. 62.

the receipt of the *Exchequer*, and tranſmitted from thence to the chapter of *Weſtminſter*.

Receipt of *Exchequer* no office of record, but in reſpect of the revenues.

The receipt of the Exchequer, is no office of record for things of this kind, but only in matters relating to the King's revenue.

The officer has taken upon him to put a title to it, which he had no authority to do, and which the paper does not warrant.

In it's utmoſt force it is a proceeding in an eccleſiaſtical court, concluding with an extrajudicial ſentence by the pope's delegate.

The officers of the eccleſiaſtical courts, ſhould not intitle their proceedings *Recordi Domini Regis Georg. &c.* for they are not records, but only evidence of ſentences in their courts.

No proceedings in the eccleſiaſtical courts of this kingdom are records, they are only evidence of ſentences in their courts; therefore I mention this, that the officers there may not take upon them to intitle them *recorda domini regis Georg. &c.* for the future.

I am of opinion it is not ſuch an inſtrument, that if the original had been produced, it could have been given in evidence.

The pope, before the reformation, exerciſed a juriſdiction, either by way of *avocation*, or by requeſt from an inferior court.

Conſider what the juriſdiction was, that the pope exerciſed before the reformation, and though uſurped, yet it muſt have it's weight.

He might exerciſe it by way of *avocation*, or by requeſt from an inferior court.

The legate *a latere* exerciſed an authority here, without an appeal to the pope.

The legate *a latere*, whilſt in the kingdom, did exerciſe a legiſlative authority without an appeal to the pope, as for inſtance, cardinal *Campejus*.

Neither

Neither the time nor the court does appear in this paper, and another inſtrument has been tacked to the parchment by a modern ſtring, but does not at all relate to the firſt paper.

Conſider what is the pope's commiſſion to the archdeacon of *Leiceſter*, whom he made his delegate: the pope does not take notice by what way the cauſe came before him, whether by appeal as by *avocation*, or by letter of requeſt.

So that here is no recital of any cauſe depending before him in any ſhape, only that there had been alienations of the revenues of the church, and that the alienees had obtained confirmations from the popes themſelves.

This was a kind of general inquiſition only, how far the poſſeſſions of this rectory had been alienated.

The two inſtruments by which they would ſhew it to be a cauſe, have no relation to one another, but tacked together in modern times.

Though an uſurped authority, it was allowed by law at that time, and muſt have it's conſideration; yet as it does not appear by this parchment that there was any cauſe depending before the pope, it can be of no ſignification, and even if it had it's utmoſt force, would be of no advantage to the rector againſt a compoſition.

I am clearly of opinion this was no ſort of evidence, and was very properly rejected by the judge, who tried the cauſe.

There is the ſtrongeſt evidence of a *modus* in this caſe, and no pretence that tithes were ever paid in kind, except this paper, and therefore there is no foundation for a new trial.

Hilary Term, 18 Geo. II.

March 3, A. D. 1745.

In *Chancery*.

Ekin againſt *Pigot*,

A *modus* being as much as the manor itſelf in Queen *Elizabeth*'s time, was thought too rank, and conſequently could not be time out of mind. 3 *Tr. Atk.* Rep. 298. pl. 206.

THE bill was brought for tithes in kind of the manor of *Dodeſhall* in the pariſh of *Quainton*.

The defendant inſiſts upon a *modus* of forty-eight pounds in lieu of all tithes for that manor.

The plaintiff's counſel inſiſted it was too rank, for the whole rectory was worth but thirty-three pounds a year in *Henry* the *Eighth*'s time; and the whole demeſne lands of that manor in Queen *Elizabeth*'s time, were worth but forty-eight pounds a year, ſo that the *modus* was full as much as the manor itſelf.

Mr. *Mills* for the defendant cited *Chapman* againſt *Monſon* [which ſee by the name of *Chapman* againſt the biſhop of *Lincoln*, under *Hilary* Term, 3 *Geo.* II.]

The plaintiff proved as exhibits the value of the firſt fruits from a return made by the augmentation office, and for the value of the manor an inquiſition *poſt mortem*.

Lord Chancellor.

There muſt be ſome ground of law, upon which to ſupport payments in lieu of tithes.

There is no perſon more unwilling than I am to ſet aſide ſuch payments in lieu of tithes, but there muſt be ſome ground of law upon which to ſupport ſuch payments.

The firſt objection was of its being too rank a *modus*, and conſequently could not be time out of mind; for the

the manor is now but eighty pounds a year, and according to the natural improvement of lands from *Henry* the *Eighth*'s time, it ought to have been ten times as much, on account of money ſinking in its value, and lands riſing in theirs.

The returns from the firſt fruit's office, and the inquiſition *poſt mortem*, though they are not concluſive evidence, yet ſufficient upon the circumſtances of this caſe, becauſe the defendant has not produced any evidence to contradict it.

Taking all the evidence together, this appears to be nothing more than a compoſition upon agreement, which parſons have ſubmitted to in ſucceſſion, from time to time, and is merely a perſonal payment, not a compoſition real, which is ſome charge given to a parſon upon lands, under a deed to which himſelf, the patron, and ordinary are parties, and of a different nature from this.

Difference between a perſonal payment upon a compoſition and a compoſition real.

Trinity Term, 18 Geo. II.

July, A. D. 1745.

In *Chancery*.

Hardcaſtle againſt *Smithſon* and *Slater*.

A Bill was brought by the plaintiff, as impropriator of the rectory of *Coverham* in *Yorkſhire*, for tithe of hay herbage and agiſtment of cattle.

Defendant admitting, that tithes had not been paid, time immemorial, *Chancery*, according to rule of the *Exchequer*, directs an iſſue to try *moduſe*. 3 *Tr. Atk.* Rep. 245. pl. 83.

The defendants inſiſt that there are, and for time immemorial have been, ſeveral ancient uſages and

cuſtoms within the ſeveral villages, *that all and every the occupiers of lands and tenements therein*, have uſed to pay yearly on St. *James*'s day to the impropriator of *Coverham*, certain annual ſums of thirty ſhillings, twenty ſhillings, *&c.* in lieu of all *tithe hay*, yearly happening within the lands, *&c.*

The defendants inſiſt on the *agiſtment tithes*, that there are payable, by ancient and immemorial cuſtom and uſage, within the ſaid pariſh, one penny halfpenny for each milch cow having a calf, and one penny for a cow not having a calf, at *Eaſter* every year.

A croſs bill was brought to eſtabliſh the *moduſes*, and Mr. *Hardcaſtle* in his anſwer admitted, that there have been time immemorial ſuch uſages and cuſtoms, as are inſiſted on by the defendants to the original bill.

Lord Chancellor.

Though *tithes in kind* are the parſon's right, yet immemorial cuſtomary payments ought to have weight.

Though it is true *tithes in kind* are the right of the parſon, yet, where there are *cuſtomary payments* in lieu of them time immemorial, it muſt have weight.

The anſwer to *the croſs bill* admits, that theſe payments have been accepted time beyond the memory of man.

Unleſs there are very ſtrong reaſons to overturn cuſtomary payments, the court will not be eaſily brought *quieta movere*.

Every purchaſer who comes into the pariſh, pays according to the rate of theſe payments, and buys upon the faith of them; and unleſs there are ſome ſtrong unſurmountable reaſons to overturn *theſe cuſtomary payments*, the court will not eaſily be brought *quieta movere*, and yet rules of law ought to be adhered to, with regard to *moduſes*.

The queſtion is, whether theſe *moduſes* can be ſupported? and if they are eſtabliſhed, it muſt be on *the croſs bill.*

They are laid in this manner, *that all and every the occupiers of lands and tenements* therein, &c. *(ſee the words before.)*

As to theſe *moduſes* a great many exceptions have been taken,

Firſt, that they are unreaſonable, becauſe the *modus* is laid for the occupiers of the lands and tenements within the pariſh, which may take in horſes, wood, malt, &c. which do not pay *tithe hay*, and therefore there is a preſumption no agreement of this kind could be entered into between the parſon and pariſhioners, and that it is in the mouth of the parſon to ſay no ſuch agreement could be made; and I allow, if there was a violent preſumption of this kind, it would have weight.

But I think no ſuch preſumption is created here, for the lands might be preſumed to be in the hands of one perſon at the time when the agreement was made, and if they were in the hands of ſeveral owners, they might all probably pay *tithe hay*, and therefore might agree, that they would pay ſo much for *tithe of hay*, whether they would have tithe of hay or not, for as they pay it at all adventures, they have the benefit of the *modus* when they have *tithe* hay, and they may therefore have *tithe* hay if they pleaſe; and ſo are the caſes.

The ſecond objection was, that the *modus* ought to be certain in point of quantity, and in point of

The rule of law is, that a *modus* ought to be equally certain, as the tithes in lieu of which it comes; the meaning of which is, it muſt be ſo taken to a common reaſonable intent, but not to be weighed by grains and ſcruples.

remedy; and in general the rule of law is, that a *modus* ought to be equally certain, as the tithe in lieu of which it comes; and is ſo laid down in the caſe of *Startup* againſt *Dodderidge*, *Salk.* 655. in the court of *King's Bench*, that a *modus* ought to be as certain as the duty which is deſtroyed by it."

To ſay it muſt be equally certain, does not mean, that it is to be weighed by grains and ſcruples.

In a caſe in *Hob.* 39. there was a *modus* for a park of two ſhillings a year, and a ſhoulder of every third deer killed in the park, which is now diſparked.

Conſider how uncertain this was, for the owner might kill none, and yet Lord *Hobart* was of opinion, after it was * diſparked, the *modus* of two ſhillings a year remained.

I mention this to ſhew, that when books ſay a *modus* muſt be certain, they mean it muſt be ſo taken to a common reaſonable intent.

As to the ſums in the preſent caſe, they are certain, but the main objection is, as to *the remedy*; for it is ſaid, that the parſon, whether he ſues in the eccleſiaſtical court, or brings his bill in equity, muſt make *all* the occupiers parties, becauſe they are *jointly* and not *ſeverally* liable.

This deſerves to be conſidered.

The laying *of this modus*, does import that all the occupiers are liable, and it muſt be underſtood of all the occupiers of the ſeveral vills and hamlets mentioned in the defendant's anſwer.

* See *Stockwell* and *Terry*, under *Trinity* Term, 22 & 23 *Geo. II.*

It

It has been truly ſaid, that all theſe lands might originally belong to one perſon, and that branching it out afterwards to different occupiers *ſhall not alter the modus.*

See the caſe of *Shelden* againſt *Montague* in *Hob.* 118. and *Cowper* againſt *Andrews*, *Id.* 39. as to the laying it on occupiers.

If this doctrine was to be allowed, that if a parſon is under a neceſſity of making all the occupiers parties, it will deſtroy a *modus*, it would be of very extenſive conſequence, and overturn a great number of *moduſes* in the kingdom.

The *majus* or *minus*, the greater or leſſer quantity of land, does not alter the caſe.

So in the caſe of *Stopp* againſt *Peacock*, 3 *Lev.* 386. the *modus* was for all the tenants and occupiers; and the court of *Common pleas* in conſideration of the caſes aforementioned in Lord *Hobart*'s Reports, granted a prohibition.

I mention this to ſhew, that theſe *moduſes* have been allowed notwithſtanding the preſcription has been laid in the *occupiers*, and notwithſtanding it has been uncertain.

I admit that every part of the land is liable to the *modus*, ſo that no occupier can be diſcharged till the whole *modus* is paid, the eccleſiaſtical court would then be juſtified in determining that every occupier is liable in *toto* and in *ſolido*.

None of the occupiers can be diſcharged unleſs the whole *modus* is paid; and it is a very reaſonable ground

Though a *modus* is laid in all the occupiers, yet ſuing a part of them is ſufficient, becauſe each is liable for the whole.

for

for the court to go upon, that every occupier is liable for the whole, and for each other, and therefore ſuing a part of the occupiers is ſufficient.

Biſhop of *Hereford* againſt the Duke of *Bridgewater*.

If it reſted only upon the caſe of the Biſhop of *Hereford* againſt the Duke of *Bridgewater*, in the court of *Exchequer*, I ſhould not determine againſt this *modus*, without directing an iſſue to try it, for the caſes of tithes are more frequently in that court as they have the proper juriſdiction.

Caſes of tithes more frequent in the *Exchequer* than in any other court, becauſe it has the proper juriſdiction.

It came twice before the *Exchequer*, firſt upon demurrer before Lord Chief Baron *Pengelly*, *&c.* and upon the hearing before Lord Chief Baron *Reynolds*, *&c.* and the court did not ſay, that the *modus* was bad, but ſtrongly inclined it was good, and were of opinion, that it ought to be tried; for, ſaid Lord Chief Baron *Reynolds*, if it was good in point of fact, he did not ſee why it might not be ſo in law.

It is admitted by the anſwer to the croſs bill, that the tithes here have not been paid in the memory of man, and therefore it is too much for the court to over-rule the *moduſes*; for all the objections are equally proper to be inſiſted on at the trial, and to be laid before a jury, as to be inſiſted on here.

It is not neceſſary that lands excepted out of a *modus* ſhould have the ſame deſcription as when the *modus* was firſt ſettled, for if they agree in point of fact, it is ſufficient.

It is not neceſſary, that the deſcription of the lands, which are excepted out of the *modus*, ſhould have the ſame deſcription as when the *modus* was firſt ſettled; for if they agree in point of fact, it will be ſufficient.

I am of opinion to follow the ſame method and rule as the court of *Exchequer*, and to direct a trial; which was directed accordingly.

Eaſter

Eaſter Term, 20 Geo. II.

May 13, A. D. 1747.

In *Chancery*.

*** *As the counſel for the reſpondents*, viz. *Meſſrs.* Mansfield *, Kenyon †, *and* Arden ‡, *obſerved, on an appeal between* Whiteheads *and others, appellants, and* George Travis, *clerk, reſpondent, heard* 26th January, 1779, THAT THE FOLLOWING CASE OF CARTE AGAINST BALL, IS VERY ERRONEOUSLY REPORTED IN ATKYNS AS WELL AS VEZEY ‖, *we have therefore thought it neceſſary to lay the ſame before the reader, as ſtated in an appendix to the ſaid appeal, intituled,* "*No.* 5. *the caſe of* Carte *againſt* Ball, *extracted from the records of the court of* Chancery ‖", *and ſecondly, to give it, as reported by the ſaid* John Tracy Atkyns, *late Curſitor Baron of the court of* Exchequer; *and, laſtly, as the caſe appears in the book of the ſaid* Francis Vezey, *one of the preſent Maſters of the court of* Chancery *in* Ireland.

* See under *Trinity* Term, 20 *Geo.* III. in the *Nomenclature of Weſtminſter-Hall*, p. 40. ſubjoined to "The Biographical Hiſtory of Sir *William Blackſtone*," 8vo Edit. 1782.

† See under *Michaelmas* Term, 21 *Geo.* III. in the ſaid "*Nomenclature*," p. 41. and under *Eaſter* Term, 22 *Geo.* III. id. p. 42, 43.

‡ See under *Michaelmas* Term, 21 *Geo.* III. id. p. 41, 44.

‖ Taken from the printed caſes of appeal, given to the Lords and counſel.

Thomas

Thomas Carte, Adminiſtrator of *John Carte*, the late Vicar of *Hinckley*, in the County of *Leiceſter*, Clerk, deceaſed. } Plaintiff.

Robert Ball, *Thomas Taylor*, *Thomas Shewell*, and others, Occupiers of Lands in the Pariſh of *Hinckley*, the Dean and Chapter of *Weſtminſter*, Impropriators of the ſaid Pariſh, and *Frances Trotman*, their Leſſee, } Defendants.

THE plaintiff's bill ſtated, that by ſome ancient endowment, uſage or preſcription, the vicars of *Hinckley* were intitled to, and ought to have received all tithes (corn and hay as well as ſmall tithes) whatſoever yearly ariſing within the township or hamlet of *Hydes*, part of the pariſh of *Hinckley*, and charged, that ſuch tithe particularly appeared to belong to the ſaid vicars, by a certain *terrier* of the pariſh, dated in 1638, and ſigned by the then vicar and church-wardens.

That the defendants, the occupiers, had, during the whole of the ſaid *John Carte*'s incumbency, (*viz.* from 1720 to 1735) holden divers lands in the *hamlet* of *Hydes*, and had reaped therefrom great quantities of corn and hay, and had carried away the ſame, together with divers quantities of ſmall tithes, without having made any ſatisfaction for the ſame to the ſaid *John Carte* during his life.

The bill therefore prayed, that the defendants, the *dean and chapter*, and their leſſee, might *admit the title of the vicar* to *all* the tithes ariſing within the hamlet of *Hydes*; and that the other defendants, the landholders, might be decreed to account with the plaintiff for the ſeveral tithes aforeſaid.

The

The defendants, *the occupiers*, ſaid, they did not believe the plaintiff was intitled to all tithes whatſoever in kind, either within the precincts of *Hinckley* in general, or within the hamlet of *Hydes* in particular; but inſiſted, that a yearly *modus* of ſeventeen ſhillings was payable to the vicar, in lieu of the tithes of the hamlet of *Hydes*, in manner following, *viz.* by the defendant *Ball* ſix ſhillings and three-pence, by the defendant *Shewell* five ſhillings and one penny, by the defendant *Stakes one* third, and by the defendant *Taylor two* thirds, of five ſhillings and eight-pence yearly, making, in the whole, ſeventeen ſhillings a year.

The defendants, the dean and chapter, admitted ſuch terrier as that charged in the bill might exiſt, but inſiſted, that it was of *no validity*, the ſame having been *contrary to the uſage* in the ſaid pariſh before, and ſince, its exhibition: and further inſiſted, that Queen *Elizabeth* being ſeiſed of the manor, rectory and pariſh of *Hinckley*, and of *all manner of tithes*, both great and ſmall, yearly ariſing within the ſaid pariſh, and of the advowſon of the vicarage thereof, did, on the 21ſt day of *May*, in the ſecond year of her reign, grant to the ſaid dean and chapter, and their ſucceſſors, the ſaid manor, rectory and church, with all their rights, members and appurtenances, *tenths*, *oblations*, and profits whatſoever—by virtue of which grant they were ſeiſed of *all manner of tythes*, both great and ſmall, yearly renewing within the ſaid pariſh.

The defendant *Tratman* ſaid, that the dean and chapter did, by an indenture, bearing date *Jan.* 12, 1737 (two years after the death of the late vicar, *Carte*, in whoſe right the plaintiff claimed)—granted to her (for the lives of three perſons, all then living) al

all manner of tithe corn, *&c.* of the pariſh of *Hinckley*; but that ſhe had never received, or claimed any right to the tithes in queſtion, and was willing the plaintiff ſhould enjoy the ſame.

[*At the hearing of the cauſe there appeared no proof whatever (ſave the admiſſions of ſome of the defendants as above ſtated) that the vicars were originally endowed with the tithes demanded by the bill; or that they had ever received any tithes whatever, either in kind, or* ſub modo, *within the* reſt of the pariſh.]

It was decreed by the Lord Chancellor (*Hardwicke*)—That the parties ſhould proceed to a trial at law on the following iſſue—"Whether "the ſaid *John Carte* was, in his lifetime, "*intitled* to take all manner of tithes, as well "great as ſmall, ariſing within the hamlet of "*Hydes*, or to any, and what, part of ſuch "tithes"—with liberty to indorſe the *poſtea*, in caſe it ſhould be found, on ſuch trial, that the ſaid *John Carte* was entitled to ſome parts of the ſaid tithes, and not to the whole.

Carte, Adminſtrator of the late Vicar of *Hinckley*, verſus *Ball*, and others.

Though this court does not take cuſtoms ſo ſtrictly certain as courts of law, yet it requires them to be ſubſtantially laid.

THE bill was brought for a ſubſtraction and account of tithes, againſt the inhabitants and occupiers of *Hinckley*, in *Leiceſterſhire*. 3 *Tr. Att.* Rep. 496. pl. 170.

The defendants inſiſt upon a contributory *modus* of ſeventeen ſhillings, for the lands which they hold of the hamlet of *Hide*, in the ſame pariſh.

The

The dean and chapter of *Weſtminſter*, who are the rectors, do not in their anſwer diſclaim the right to the tithes, but refer to their leſſee, who apprehended ſhe had no right, and has never collected them.

Mr. Attorney General for the defendants.

He ſaid, a vicar of common right is not intitled to tithes, but by virtue of an endowment or grant from thoſe who were the owners of the land.

An ancient payment *for tithes* is a *modus*, and ſuppoſes an agreement originally.

Lord Chancellor.

A general charge of an endowment is ſufficient to intitle the plaintiff to ſhew an endowment at the hearing, without mentioning *the particular ſort of endowment*.

Mr. Attorney General then went on, and ſaid, the receipts run in this manner: *May*, 1702, received then of *Robert Ball*, the ſum of eleven ſhillings and four-pence, for the tithe due at *Lady-day*, for his part of the *Hide grounds*. Signed *John Par*.

Other receipts call it the *Hides* only.

Mr. *Clarke*, of the ſame ſide, cited *Hardcaſtle* againſt *Smithſon*, *July*, 1745, before Lord *Hardwicke*, [which ſee under *Trinity* Term, 18 *Geo.* II.] to ſhew, that the court will not conſtrue the *modus* with great nicety, where it is in general properly ſet out by the anſwer.

Mr. *Evans* of the ſame ſide: A rector has nothing to do but to make out his title to the rectory, and the

the tithes will be due of courſe to him; *but otherwiſe as to a vicar.*

There is no evidence ariſes from uſage; for the plaintiff has not been able to ſhew the tithes were even paid to the vicar.

That a *terrier*, neither here, or at *niſi prius*, has been admitted to be evidence of the vicar's right, unleſs uſage goes along with it.

Mr. Solicitor General for the plaintiff ſaid, that in the caſe of *Berry* againſt *Evans*, [which ſee under *Eaſter* Term, 12 *Geo.* II.] Lord Chief Baron *Comyns* ſolemnly determined, that even againſt a lay impropriator, you cannot preſcribe *in non decimando*. and in extra-parochial places the King is intitled, and if it appears the rector is not intitled, the *vicar* muſt.

Lord Chancellor.

This is an unuſual demand, as it is a bill brought by an adminiſtrator of a vicar, who was for fifteen years together vicar of this pariſh, and yet during all the time of his incumbency no tithe was paid, or demand ever made; but however, if the right appears, the plaintiff is intitled to a decree.

His right depends on two queſtions;

Firſt, Whether, as ſtanding in the place of the vicar, he has ſhewn a right to the tithes in kind.

Secondly, Whether the *modus* ſet up by the defendant's anſwer, is not a ſufficient bar to that right.

I will take up the ſecond queſtion firſt.

I am

I am of opinion the *modus*, as ſtated in the anſwers of the defendants, is not ſufficiently laid in point of law.

It is more correctly laid in the ſecond anſwer, and is laid there in the following manner: Seventeen ſhillings in the whole paid for the *Hides* in lieu and ſatisfaction of all tithes, 5 *s.* and 8 *d.* for the part of *Hides* in the occupation of ſuch a perſon, 4 *s.* and 4 *d.* for the part in the occupation of another, and 7 *s.* for the part in the occupation of another.

Two objections have been taken by the plaintiff's counſel, that it does not ſay the time when it is to be paid, nor enumerates the perſons by whom it is to be paid.

As to the firſt, in the court of *Exchequer*, if a particular time was not laid, that court formerly would have over-ruled the *modus*, and not gone into the merits, but latterly they have very properly let in a greater latitude of proof, and it is ſufficient if it is laid at a particular time, or *thereabouts*.

But the ſecond is what I lay ſtreſs upon, that it is not ſaid by whom it is to be paid, and I do not know any caſe in the books or in experience, where it is not alledged to be paid by ſome body, and it is very reaſonable it ſhould be ſaid by whom, becauſe the parſon may then be ſure to whom he muſt apply, or againſt whom he may have a remedy for his tithes.

This cannot be ſupplied by ſaying, that in other parts of the anſwer, they have ſhewn the ſeventeen ſhillings have been paid by thoſe perſons who have held theſe lands, for that may be accidental; and

though it has been ſaid, this court does not take cuſtoms ſo ſtrictly certain as courts of law, yet this court requires cuſtoms to be ſubſtantially laid.

If before the court of *Exchequer*, where caſes of this kind are more frequent, it would have been over-ruled at once.

The next queſtion is upon the evidence.

No proof has been read to ſhew there ever was ſuch an intire *modus* paid of ſeventeen ſhillings a year, but the defendants add ſeveral *moduſes* together, and then, by computation in arithmetic, make juſt the ſum of ſeventeen ſhillings: in ſome meaſure like the Duke of *Grafton*'s caſe of fines, where, by looking into the Lord's books, they found what was the largeſt fine he took, and charged that ſum to be the cuſtomary payment.

There is no evidence that theſe payments are applicable to the *modus*, and therefore I am of opinion it is not ſufficiently made out.

Upon the opinion I have given as to this part, if the plaintiff had been *rector*, I ſhould have decreed at once for him; but a rector differs materially from a *vicar*.

To intitle himſelf to tithes, a rector has nothing to do, but to prove himſelf ſo; as to a vicar, otherwiſe, for he muſt ſhew an actual endowment.

A rector has, and ſo has a lay impropriator, a right to all the tithes in the pariſh, and has nothing to do, but to prove himſelf rector: it is otherwiſe with regard to a vicar; for he muſt ſhew an actual endowment, or evidence of the uſage.

In the firſt place, there is no evidence here of payment of tithes of any kind, which will be a much more

more material conſideration againſt a vicar than a rector.

Whether the anſwer be ſo formally drawn as might be, yet it is ſufficient as to the denial of the plaintiff's right; for though the defendants admit *Carte* was vicar, yet they ſay they do not know or believe, that he was intitled to the incloſed grounds of *Hinkley*, and to all or any part of the tithes.

So that, by their anſwer, they inſiſt he was not intitled; but then it is argued for the plaintiff, that the defendants ſetting up a *modus*, is an implication that the vicar was intitled to tithes; and to be ſure it is; but this does not preclude the defendants from objecting to the plaintiff's title; and it would be hard to preclude them, becauſe they fail in the defence they ſet up for themſelves.

Setting up a *modus* does not preclude the defendants from objecting to the plaintiff's title to tithes.

Suppoſe a plaintiff at law declares, and the defendant pleads any thing in bar, which by preſumption admits the demand, whereupon the plaintiff demurs, and the court holds the plea bad, yet they will ſtill ſee whether the plaintiff, in his declaration, has made a caſe ſufficient to intitle him to recover.

If a defendant pleads any thing in bar, which by preſumption admits the demand, and the plea is held to be bad, yet a court of law will ſtill ſee whether the plaintiff has made a caſe that intitles him to recover.

The plaintiff is, unfortunately for him, precluded by the rule of this court from reading the evidence of the endowment, which, it is ſaid, would have put this matter out of queſtion.

The abbot of *Lyra*, in *Normandy*, has ſent a certificate of the original agreement between the rector and the vicar in relation to tithes, muſt appear to come out of the charter-houſe of the abbot, and not out of his hands only, or it cannot be read.

A certificate of the original agreement between the rector

and the vicar in relation to the tithes; but though it appears to come out of the abbot's hands, yet as it does not appear that it came out of the charter-house of the abbot, or that he was the proper officer to keep the records, it could not be admitted to be read.

A certificate from a foreign abby, was not allowed before the reformation.

Even before the reformation, a certificate from a foreign abbey was not allowed; therefore, as the original deed relating to the endowment cannot be read, I must take it from the evidence before me, which is, that no tithe has ever been paid to the vicar.

The terriers are very dark, and I can hardly make any judgment of them, and it is very far from being clear from thence, that tithes in kind were ever paid to the vicar.

A vicar may not only be endowed of the tithes of a parish, but of *a pension* likewise.

A vicar may not only be endowed of the tithes of a parish, but of *a pension* likewise, and therefore how can I presume he was endowed of the tithes, when he might be endowed of this annual payment by way of pension.

If it depended upon this only, I would inquire, whether in any case tithes have been decreed in kind to a vicar, where there is no evidence of tithes having ever been paid to him in kind.

The dean and chapter, the rectors, do not disclaim their right to the tithes; if they had, it might have put an end to the question in favour of the vicar; this being the case, I am not satisfied he is intitled to the tithes in kind, and therefore it must be put in a method of trial.

It

It is ſaid the rectors ought to be parties to the iſſue, but it is not neceſſary they ſhould; for where an impropriator's right does not come in queſtion, he need not even be made a party to a bill that is brought for ſubſtraction of tithes.

Where an impropriator's right does not come in queſtion, he need not be made a party to a bill for ſubſtraction of tithes.

His Lordſhip directed an iſſue to try, whether the vicar of *Hinckley* is intitled to tithes in kind, for the *hamlet* of *Hyde*, in the pariſh of *Hinckley*.

Carter againſt *Ball*.

THE bill was brought by the plaintiff as adminiſtrator of his brother, late vicar of *H.* for arrears of tithes in kind, due during the vicar's incumbency. The defence made was, that the vicar was never endowed, and that there was a yearly compoſition by way of a *modus*, of ſeventeen ſhillings, in lieu of all manner of tithes; which the defendants attempted to prove by receipts of former vicars, and evidence that tithes in kind were not paid within the memory of man, the plaintiff was obliged to prove the endowment, as his brother was only vicar and not rector, which he offered to do, by producing a grant in the year 1209, by the abbot and convent of *Lyra* in *Normandy*, to the vicar of this pariſh, as evidence of the endowment of all manner of tithes; but it was not ſuffered to be read, as it was not ſhewn to have come out of that monaſtery. The plaintiff next produced three terriers, the firſt of which was in 1638, the reading of which was allowed as being evidence, though not concluſive: it never was diſputed in the *Exchequer*, and even the parſons books have been read.

Vex. Rep. 3. pl. 3.

Lord Chancellor.

This is a very unuſual demand; the queſtion is, if the plaintiff has ſhewn an original right in the vicar, to the payment of tithes in kind, and if the *modus* be a ſufficient bar thereto; the *modus*, as ſtated by the anſwer, is not ſufficiently laid in point of law, nor is it ſufficiently proved; the firſt objection thereto is, that no time of payment is ſhewn, that was formerly neceſſary in the *Exchequer*, but that court has ſince very juſtly departed from that rule; however, the ſaying it was to be paid yearly, is too uncertain, but the principal ground of the inſufficiency of the *modus* is, that it is not ſaid by whom to be paid, which is neceſſary, in order to ſhew againſt whom the parſon has remedy for that cuſtomary payment. Then conſidering it upon the evidence, there is no proof of an intire *modus* of ſeventeen ſhillings, but only it was paid ſeparately, and by contribution; nor do the receipts import a *modus*. But as to the plaintiff's demand, this caſe ſtands in a different light; here is no evidence of payment of tithes in kind, which is more material in the caſe of a vicar than of a rector, who is of common right intitled to tithes, and non-payment cannot be alledged by preſcription againſt him; but a vicar being intitled to payment of tithes in kind againſt common right, muſt ſhew an endowment either actual, or by collateral evidence, of ſuch uſage; of which there is none here. The uſage of this pariſh ſhews, there muſt be ſome ſubſequent endowment; but as the original thereof cannot be read, the court muſt take it on the evidence, which does not prove that tithes in kind were ever paid; for the terriers are dark, and do not import ſuch payment; and I much queſtion, whether there is any inſtance of a deeree

See the caſe of *Richards* againſt *Evans*, and *Mitchel* againſt *Neal*, under *Michaelmas* Term, 21 Geo. II.

decree for ſuch payment, where there is no evidence of it, though there might be in the caſe of a rector; therefore, though the *modus* is inſufficient, there is ſufficient in the defendant's anſwer to intitle him to object to the plaintiff's right; which he not having proved, he cannot have a decree; nor yet ſhould his bill be diſmiſſed, but ſome other way for relief be found. Let an iſſue be directed to try whether the vicar was in his life intitled to the payment of tithes in kind. The plaintiff had time and opportunity given him to eſtabliſh this ancient endowment, and to examine it by commiſſion, which was not executed; the jury found, that the vicar in his life, was not intitled to theſe tithes in kind; and the bill was *July* 17th, 1749, diſmiſſed with coſts at law, but not in this court.

But Lord Chancellor then ſaid, that as to the *modus* which is admitted by the anſwer, the plaintiff is intitled to the arrears thereof, during his brother's life, notwithſtanding the objection taken by the defendant that the bill was barely for tithes in kind, and the plaintiff himſelf inſiſted that the *modus* was not good, an iſſue could not properly be directed on the *modus*, becauſe that would be admitting ſome kind of endowment or other, and excluding the other point; ſuch an iſſue therefore was directed as would take in both. It often happens, both in the eccleſiaſtical court and court of *Exchequer*, that on the diſmiſſing a bill brought barely for tithes in kind, the plaintiff may yet have a decree for a *modus* admitted by the defendant's anſwer; and it is the ſame in this court, ſince it is a good *modus* in its nature, and only imperfectly ſet forth in the anſwer in not alledging that it was payable by the occupiers of the land, though there might be more in it if was not good in its nature.

Trinity Term, 20 & 21 Geo. II.

A. D. 1747.

In the *Exchequer*.

The Vicar of *Kellington*, in *Yorkſhire*,

againſt

The Maſter and Fellows of *Trinity* college, in *Cambridge*, rectors, their leſſee, and two occupiers of lands, in the pariſh.

Sir *Thomas Parker*, Lord Chief Baron.

Survey of a religious houſe, taken in 1563, allowed good evidence to prove a vicar's right to ſmall tithes. *Wilſ.* Rep. 170.

THIS is a bill brought by a vicar, for the tithe of *agiſtment* of barren cattle, ſetting forth, that he is intitled by endowment, preſcription, uſage, or otherwiſe, to all *ſmall tithes* within the pariſh; and to make out his right thereto, produced in evidence, an ancient ſurvey (from the firſt fruits office) of the poſſeſſions belonging to the nunnery of ——— without the walls of *York*, to which this rectory was appropriated; which ſurvey was taken in the year 1563, upon the diſſolution of monaſteries *tempore Hen.* VIII. whereby it appeared, what ſpecies of tithes belonged to the *rector*, and what to the *vicar*, *viz.* corn, grain, and hay, to the *rector*; and to the *vicar* wool, lamb, and all *other ſmall tithes*; alſo another ſurvey taken by the college *anno* 33 *Eliz.* was produced, which agreed with the former. It was objected, that it does not appear by what authority the ſurvey in the year 1563 was taken; the anſwer is, that theſe ſurveys have always been allowed, as proper evidence, and to be read,

read, notwithſtanding the commiſſions, under which they were taken, be loſt; it has alſo been objected, and it appears in proof that *agiſtment* tithes have been paid to the *rector*, for fifty years laſt paſt; in anſwer to this it is proved, that before *that* time, *viz.* ſixty years ago, this *ſpecies* of tithe was paid to two *vicars*; ſo that I am of opinion, here has been an uſurpation upon the *vicar*, for fifty years laſt paſt. If an *endowment* appears, *that* is the rule we are to go by; if it doth not, *uſage* is the rule; therefore, if there had not been this written evidence (to be ſure) the payment to the *impropriator* for fifty years, would have been very ſtrong proof for him againſt the *vicar*; but on the other ſide, here is a record which proves that the *vicar* is intitled to *all ſmall tithes*, and at this day there is no doubt, that *agiſtment* tithe is a ſmall tithe; and the court decreed in favour of the vicar.

Agiſtment is a ſmall tithe.

July 20, A. D. 1747.

In *Chancery.*

Ekins againſt *Dormer.*

Lord Chancellor.

THE bill was brought for tithes in kind of hay, of a moiety of the manor of *Shipton*, but comes in an imperfect manner before the court.

A grant from Queen *Mary* of *decimas bladorum & feni & omnes alias decimas*, theſe general words are not ſufficient to bar the rector of his common right of tithes, unleſs expreſsly ſtated what was the right of the crown. 3 *Tr. Atk.* Rep. 534 pl. 194.

The plaintiff as rector is intitled to all tithes, unleſs there is ſome bar, as a *modus*, compoſition, *&c.*

The queſtion here is as to a moiety of the privy tithes of the demeſnes of a manor, and the tithe hay,

hay, whether the rector is intitled in point of pernancy to the whole, or the defendant is intitled to this moiety as well as to the tithes of corn and grain under a grant from the crown, the first year of Queen *Mary*, in which were these general words, *decimas bladorum & fœni & omnes alias decimas.*

I do not think any stress can be laid on those general words, and take them in their utmost extent, are not sufficient to bar the rector of his common right, unless it had been expressly stated what was the right of the crown; and in making out the grant, the drawer might probably, at the request of the grantor, put in these general words.

There is no pretence of payment of the privy tithes to the Lord of the manor. I am of opinion these general words are by no means sufficient to shew a right in the defendant against the rector.

The next question is as to the two *moduses.*

The first objection was, as to the manner of introducing them in the cause, for that in respect to the cross bill they are not set out with any certainty, and to be sure they are not, and therefore the cross bill must be dismissed: but a different consideration arises upon the original bill; notwithstanding the particular *moduses* are not mentioned in the bill, nor particularly pleaded by the answer, yet as the plaintiff's own witnesses shew a reasonable ground for a *modus*, it would be going too far to say that an account of tithes should be decreed, where even upon the plaintiff's evidence it appears there is a *modus.*

I am of opinion therefore the court is bound to take notice of the two *moduses*, the ten shillings for

hay, and five pounds for the privy tithes of the demeſne lands.

As to the firſt, it is mentioned to be a *modus in decimando* in the receipt for it from the parſon, but the receipt for the five pounds calls it a compoſition.

It has been ſaid, that the *moduſes* are too rank, and that the ten ſhillings for hay particularly are ſo, becauſe the *modus* for the tithes of corn is but three and thirty ſhillings.

No argument at all is to be collected from thence, becauſe leſs might be in tillage at that time than there is now.

The objection is ſtronger as to the five pounds for the privy tithes of the demeſnes; undoubtedly it is a pretty large ſum, and it has been inſiſted the whole value of the manor is but fifteen pounds, as appears from an ancient ſurvey in *Henry* the VIIIth's time, where it is called *firma* of *Shipton*, which implies a rent reſerved.

But I can no more infer from thence, that this was the value of the rack-rents of the manor in *Henry* the VIIIth's time, than I can at preſent the real value of a biſhop's manor from the rent reſerved in a leaſe of it.

In a caſe that came by appeal to the Houſe of Lords in Lord *Talbot*'s time relating to the pariſh of *Chedingford* in the county of *Surry*, the Lords reverſed a decree of the court of *Exchequer* for being rank, it being too much for that court to determine it to be no *modus*, where the evidence was not concluſive againſt it, but preſumptive only.

The Houſe of Lords reverſed a decree of the Exchequer for being too haſty in rejecting a *modus* as too

too

too haſty in rejecting a *modus* as too rank, and ſaid, it was taking too much upon them to determine it to be no *modus* upon ſuch kind of evidence, which was not concluſive evidence againſt a *modus*, and directed an iſſue to try it.

Another objection was, that the five pounds is no *modus* at all, for in the receipt from the parſon it is mentioned to be an ancient compoſition.

An ancient compoſition is ſynonymous with a *modus*, unleſs ſomething be ſhewn that breaks in upon its *immemorialneſs*.

I do not know the abſolute diſtinction between an ancient compoſition and a *modus*; there may be a a difference between a compoſition that is not beyond the memory of man and a *modus*, but unleſs ſomething be ſhewn that breaks in upon the immemorialneſs of it, it is ſynonymous with the *modus*.

A real compoſition is where an agreement is made with a parſon or vicar, with the patron and ordinary's conſent, that ſuch lands ſhall be diſcharged from the payment of tithes *in ſpecie*, on account of a recompence made to the parſon or vicar out of other lands.

There is indeed a difference between *a real compoſition* and a *modus*, for a real compoſition is when an agreement is made with a parſon or vicar, with the conſent of the patron and ordinary, that ſuch lands for the future ſhall be diſcharged from the payment of tithes in ſpecie, by reaſon of a recompence made to the parſon or vicar for them out of other lands; but a *modus* is nothing more than an ancient compoſition between a lord of a manor and the owners of the land in a pariſh and rector, which gains ſtrength by time.

Where there is no objection in point of law to *moduſes*, nor tithes in kind ever received within the memory of man, the court will not decree an account of tithes.

I am of opinion here is a conſiderable foundation laid before the court for the two *moduſes*, the one of ten ſhillings, and the other of five pounds, and therefore the court cannot decree an account of tithes where there is no objection in point of law againſt them, nor any pretence there has ever been tithes in kind received within the memory of man, and therefore iſſues muſt be directed to try theſe two ſums.

The

The plaintiff being in court, and declining to try the *modus* of ten ſhillings for tithe hay of the manor, and five pounds for privy tithes of the demeſne lands, his Lordſhip decreed an account of what was due for thoſe annual payments.

Michaelmas Term, 21 Geo. II.

October 26, A. D. 1747.

In *Chancery*,

Richards againſt *Evans*.

and

Evans againſt *Richards*.

THE plaintiff as rector brings a bill for payment of tithes in kind, the defendant as owner of the form brings a croſs bill eſtabliſhing a cuſtomary payment of ſeven pounds *per ann.* in lieu and ſatisfaction thereof.

Not neceſſary to uſe the word *modus* in laying it. *Vaz.* Rep. 39. pl. 24.

For plaintiff; this *modus* is neither well laid nor proved, nor is the day of payment certainly ſpecified, for want of which a *modus* was held not good in point of law in the *Exchequer*, *Trinity* Term, 5 Geo. I. becauſe the time of payment of a *modus* ought to be as certain as of the tithes, in place of which it is ſubſtituted; which as to the fruits of the earth is immediately on the firſt ſeverance, and a cuſtom uncertain is no cuſtom: then the payment of ſuch a groſs ſum is an evidence againſt the *modus*, as too rank; for as every *modus* muſt be preſumed to commence before the time of memory, this many years

Nor a particular day of payment.

A *modus* may be overturned for rankneſs, if for a ſpecifick thing; if otherwiſe, will be ſent to trial.

ago muſt have been very near the value of the farm: it is therefore rather a modern compoſition, or rent for tithes.

Lord Chancellor.

The objections of laying the *modus* are of no weight: for neither in law or equity is there any neceſſity to uſe the word *modus*, as appears from all the caſes on this head, as in *Cowper* againſt *Andrews*, *Hob.* 39. *Shelton* againſt *Montague*. *Hetl.* 118. and 1 *Vent.* 3. it being only a technical term, not uſed in pleadings; in ſtating of which, Lord *Hobart* was very accurate. The material words are ſo much money paid in lieu and ſatisfaction of tithes. As to the general queſtion, whether it is neceſſary to lay and prove a particular day of payment; the caſe in the *Exchequer* was certainly ſo determined, but I remember that gave general diſſatisfaction in *Weſtminſter-hall*, and abroad, as too nice to require the proof of a particular day; and it has been ſince adjudged to the contrary that on or about is ſufficient; ſo that they have left off taking that exception in the *Exchequer*. Then it reſts on the merits: and that depends on the evidence on both ſides, which is of two kinds; firſt, of the fact and uſage of payment; ſecondly, ſuch as ariſes from the nature of this *modus*. If it is turned on the firſt, it is the ſtrongeſt evidence I ever knew, againſt payment of tithes in kind, for which there is no proof on the part of the rector: that indeed, being only a negative, would not prevail to take away the common right that is in the rector, if there was nothing more; but in ſupport of the cuſtomary payment, there is the evidence of ſome terriers which makes a diſtinction throughout, between this and other parts of the pariſh, where tithes were paid in kind: and there is the rector's own

Carter againſt *Ball.*

own admiſſion of this. As to the remaining objection to the *modus*, ariſing from the nature of it, as too rank, ſeveral, indeed, have been overturned on this point; but the diſtinction taken for the defendant is material, that a *modus* be overturned for rankneſs, even at hearing of the cauſe, where it is for a ſpecific thing, as a lamb, *&c.* becauſe the price of the thing may be found from hiſtory, and ancient records; but that is an objection from a fact, which, becauſe it appears with ſuch a degree of certainty, the court determines without ſending it to be tried: but where it is not for a ſpecifick thing, there are ſeveral other circumſtances to be taken into conſideration of rankneſs; as the difference of the value in the courſe of time. The Houſe of Lords therefore ſent a caſe of this ſort to be tried, without overruling it. If this had come ſingly upon the rector's bill, it ſhould, without any ſcruple, be immediately be diſmiſſed; for that would not have hurt the ſucceſſion; nay, it would be open to the rector himſelf; but the owner bringing a bill alſo to eſtabliſh a *modus* that would bind the ſucceſſors in the pariſh; and it being of conſequence, that a great part of the evidence ariſes from the rector's own admiſſion, if the defendant inſiſts on eſtabliſhing it, the rector (unleſs he ſubmits to the decree) ſhall have an opportunity to try it at law.

Chapman againſt *Smith*, *July* 27th, 1754.

December

December 17, A. D. 1747.

In *Chancery.*

Mr. Baron *Clerk* ſitting for *Lord Chancellor.*

Bell againſt *Read.*

In *May*, 1743, a bill was brought againſt the defendants for tithes; the 28th of *April*, 1746, the cauſe was heard at the *Rolls*, and an account decreed, and the defendants directed to pay what ſhould reſpectively be found due: to a ſecond bill for the ſame matter, the defendant pleads the firſt, and the decree. Mr. Baron *Clerk* allowed the plea, as the defendant would otherwiſe be put to double expence and double vexation. 3 *Tr. Atk.* Rep. 590. pl. 229.

THE plaintiff, as rector of *Blunſden*, in *Wiltſhire*, brought his bill againſt the defendants, as occupiers of lands in the pariſh, for the great and ſmall tithes, and prays that they may come to an account with him for the tithes *which are due and payable to the plaintiff*, and that they may pay to him all and ſingular his tithes and duties for the future, as they ſhall accrue and grow due, as long as he continues rector there.

The defendants, as to ſo much of the bill as ſeeks any account or diſcovery of the tithes ariſing in *Blunſden*, at any time before the 28th of *April*, 1746, plead, that before the plaintiff exhibited his preſent bill, he did, in *May* 1745, exhibit his firſt bill againſt the defendants for an account and diſcovery of the tithes ariſing in *Blunſden*, and by that bill prayed, that the defendants might pay the plaintiff the full value of ſuch tithes with which the defendants were chargeable, *and which ſhould appear to be due to the plaintiff*, and alſo that the defendants might pay to the plaintiff *all his tithes for the future as they ſhould grow due, ſo long as he continued rector of* Blunſden; and on the 28th of *April*, 1746, that cauſe was heard before the Maſter of the *Rolls*, and

and it was ordered to be referred to Mr. *Bennet*, to take an account of what was due to the plaintiff from the defendants, for all the tithes demanded by the plaintiff's bill, and that they ſhould pay him what ſhould reſpectively be found due from each of them.

And in purſuance of the decree the plaintiff has left with the Maſter, three diſtinct charges againſt the three ſeveral defendants, and examined witneſſes in order to ſupport his charges, and alſo exhibited interrogatories before the Maſter for the examination of the defendants, who have each of them put in their ſeveral anſwers and examinations to the interrogatories.

And, in regard the plaintiff is by his preſent bill ſeeking the ſame relief and diſcovery as he ſought by his former bill, and as is already provided for him by the decree, according to the uſage of this court in caſes of this nature, the defendants do therefore plead the former bill, anſwers, decree, *&c.* in bar to ſo much, and ſuch part of the plaintiff's bill as aforeſaid.

Mr. *Tracy Atkyns*, in ſupport of the defendants plea, ſaid, that the ſecond bill muſt either be brought for vexation merely, or proceed from ignorance, and want of knowing the practice of this court; for he apprehended there was a material difference between the decrees of the *Exchequer* for an account of tithes, and the decrees of this court; that there they are directed to the time of filing the bill only, but here to the time of the Maſter's report.

That Lord *Chancellor* ſeemed to be of this opinion in the caſe of the * *Archbiſhop of York* againſt *Sir Miles Stapleton and others*, *February* 21, 1740; "That

* Which ſee under *Hilary* Term, 13 Geo. II.

" was a bill brought for an account of tithes, and " to eſtabliſh the cuſtom of ſetting out corn in " ſtacks; his Lordſhip directed an iſſue to try the " cuſtom, and ſaid, though it will be time enough " to ſearch for precedents as to the manner of di- " recting the account, when the cauſe comes back " after trial, yet he took the difference between the " courſe of proceeding in the court of Chancery, " and the court of *Exchequer*, to be this, that there " they direct an account of tithes no further than " the bringing of the bill; but here the rule of the " court in general is, where an account of tithes is " decreed, that it ſhall be carried down even to the " time of the Maſter's report, and not to the filing " of the bill only."

Mr. *Tracy Atkyns* obſerved further, that the rule is the ſame in ſimilar caſes, where the account is to be taken, and that in the caſe of **Bulſtrode* againſt *Bradley*, *Michaelmas* Term, 1747, Lord *Chancellor* was pleaſed to ſay, " It is the conſtant practice of the court, " in decrees againſt a mortgagee upon a bill for re- " demption, or againſt an executor to account, to " direct it without future words; and yet if the " perſon decreed to account, receive any thing ſub- " ſequent to the decree, it is inquirable before the " maſter equally with ſums received before the " decree."

* 3 *Tr. Atk.* Rep. 582. pl. 224.

That if this be the practice, the plaintiff, by the decree in the firſt cauſe, may carry the account full as far under the firſt ſuit, as he can under the ſe- cond, and conſequently the laſt is multiplying ſuits unneceſſarily, without any advantage to the plain- tiff, or anſwering any end, but what he has already, or might have obtained under *the former decree*.

Mr.

Mr. Baron *Clark.*

The defendants plea of a former ſuit depending for the ſame matter ought to be allowed, or otherwiſe the defendant may be put to double expence, and double vexation, as poſſibly, if the ſecond cauſe was to proceed, the decree may be different from the decree in the former ſuit.

As to the difference in practice between the two courts, the Exchequer and Chancery, it is undoubtedly ſuch as has been inſiſted on by the defendants counſel, and in decrees for account of tithes in the court of Chancery, they are not drawn up differently from decrees to account in other matters, but are general, to account for all tithes that are due, without ſpecifying any particular time charged in the bill, or limiting the account to any certain determinate time.

Decrees for account of tithes in the court of Chancery are general, to account for all that are due, without ſpecifying any particular period, or limiting the account to a certain determinate time.

And as, according to the practice of this court, an account for tithes may be carried on as long as the ſuit is depending between the parties; it would be vexatious if the plaintiff ſhould be allowed to proceed in a ſecond bill for the ſame individual tithes; I ought therefore to allow the plea as to the particular period of time covered by it the 28th of *April*, 1746, the time when the cauſe was heard and decree made: and it was allowed accordingly.

Hilary Term, 22 Geo. II.

March 25, A. D. 1748.

The laſt ſeal after *Hilary* Term.

In *Chancery*.

Rotheram againſt *Fenſhaw*,

A ſuit in the eccleſiaſtical court for ſubſtraction of tithes, the defendant there brings a bill to eſtabliſh a *modus*, and on the bare ſuggeſtion of a *modus* moves for an injunction to ſtay the proceedings in the eccleſiaſtical court.

THE defendant inſtituted a ſuit in the eccleſiaſtical court for ſubſtraction of tithes; the defendant, without pleading any diſcharge there, brings his bill in this court to eſtabliſh a *modus*; the anſwer to the bill does not admit it, and the motion now is for an injunction to ſtay the proceedings in the eccleſiaſtical court, upon the bare ſuggeſtion of a *modus* by his bill.

The injunction denied, as it would be a precedent for tripping up the heels of two courts, the eccleſiaſtical and the court of common law. 3 *Tr. Atk.* Rep. 628. pl. 242.

Lord Chancellor.

An injunction is prayed on two heads; *Firſt*, on a preſumption from a conſtant non-payment of tithe hay time immemorial, there muſt have been an alienation from the perſons under whom the defendant claims, though the plaintiff is not able to produce the particular grant of thoſe tithes to his anceſtor.

Secondly, upon a ſuggeſtion in the bill, that there has been a *modus* or compoſition conſtantly paid in lieu of tithes.

If I ſhould grant this injunction, I ſhould make a precedent for tripping up the heels of two courts, the eccleſiaſtical court, and a court of common law.

The

The eccleſiaſtical court have a right to retain ſuits for tithes, whether at the inſtance of a ſpiritual perſon or lay impropriator.

There may be a ſuit too in that court for a *modus*, as well as for tithes in kind.

The defendant likewiſe may plead a *modus* there, if admitted; the eccleſiaſtical court may go on upon the *modus*; if denied, the eccleſiaſtical court cannot proceed *propter triationis defectum*, and if ſo, it is the common ſuggeſtion for a prohibition in the court of *King's Bench*; but if you come there for a prohibition, you muſt firſt ſhew the *modus* has been pleaded in the eccleſiaſtical court, and denied there.

The court of *King's Bench* will not grant a prohibition unleſs you ſhew the *modus* has been pleaded in the eccleſiaſtical court and denied there; and on the ſame grounds a court of law grants a prohibition, this court grants an injunction.

No ſuch thing has been ſhewn in this caſe; but a bill is brought to eſtabliſh a *modus*, and prays an injunction to ſtay proceedings in the eccleſiaſtical court, upon the ſuggeſtion of a *modus* only.

I cannot grant an injunction here but upon the ſame grounds as a court of law would grant a prohibition, *propter triationis defectum*.

Injunctions in this court are granted upon a ſuggeſtion of ſomething which affects the right or convenience of the party in the proceedings in the other court, or where there is a concurrent juriſdiction.

The *modus* is not admitted by the anſwer to the bill in this court, and if inſufficient you may except to the anſwer; and even if the ſuit goes on in the ſpiritual court, and a ſentence is pronounced for the tithes, it is no prejudice at all to the plaintiff in his ſuit depending here.

But if I was to grant this motion, I ſhould take away the juriſdiction of the ſpiritual court on the one hand, and the court of common law on the other.

As to the non-payment of the tithe hay, it is inſiſted, the owner of the land was formerly a purchaſer of the tithes, and has enjoyed the land and tithes together for a great length of time, which is a preſumptive evidence of his right.

But this is not a ground for an injunction in a caſe of this nature.

A lay impropiator cannot preſcribe *in non decimando* any more than a ſpiritual perſon.

A lay impropriator is to be ſure different from a ſpiritual in ſome reſpects: ſince the reformation, and the acts for diſſolution of monaſteries, tithes by grants from the crown are become lay fees; ſo that in fact lay impropriators have as much power to convey a portion of tithes as any part of the land itſelf: and therefore it was ſaid, it is hard the plaintiff ſhould not in this caſe have the ſame advantage of preſumptive evidence from long poſſeſſion in the caſe of tithes, as well as in any other caſe relating to an eſtate of inheritance; and it was a ſaying of Lord Juſtice *Hale*, he would preſume even an act of parliament made in favour *of length of poſſeſſion:* but the court of *Exchequer* in the caſe of the aldermen of *Bury* againſt *Evans*, [which ſee under *Eaſter* Term, 12 *Geo.* II.] would not lay down a different rule as to preſcribing in *non decimando*, in regard to lay impropriators and ſpiritual perſons, but held ſuch a preſcription equally bad againſt both.

The plaintiff might have pleaded length of poſſeſſion in the eccleſiaſtical court, and if they refuſed to determine upon the ſame evidence as a court of law would have done, it is the uſual ground for a prohibition, and the court of *King's Bench* has alone the cognizance of it.

Upon the whole, I do not ſee there is any reaſon at all for the injunction which is now moved; why

did not the plaintiff go upon the length of poſſeſſion in the eccleſiaſtical court? he might have pleaded it there, as well as inſiſt upon it here in his bill; and if the eccleſiaſtical court would not determine upon the ſame evidence as a court of common law would have done, it is the uſual ground for a prohibition, and no other court has the cognizance of it but the court of *King's Bench*, and therefore I will not make ſuch a precedent, as by a ſide-wind will take away the juriſdiction of both courts at once. Lord *Hardwicke* therefore denied the motion.

Eaſter Term, 22 Geo. II.
April 25, A. D. 1748.

In *Chancery*.

Ex parte Croxall, Miniſter of the united pariſhes of St. *Mary Somerſet*, and St. *Mary Mountſhaw*.

If the lord mayor has done wrong in refuſing his warrant of diſtreſs for levying ſums of money on the inhabitants, who denied the miniſter his due according to the aſſeſſment made in the year 1681, under the act of parliament paſſed 22 & 23 *Car.* II. chap. 15. for the better ſettling the maintenance of the parſons, *&c.* in the pariſhes of the city of *London* burnt by the fire; in this caſe the court of *Chancery*, upon petition, can iſſue their warrant for levying the ſums aſſeſſed. 3 *Tr. Att.* Rep. 639. pl. 250.

THE petition prayed that the Lord Chancellor would iſſue his warrant for levying the ſums of money mentioned in the petition, on ſeveral inhabitants of theſe pariſhes, who had refuſed to pay the miniſter his dues, according to an aſſeſſment in 1681.

It depended upon the conſtruction on the ſtatute of 22 & 23 *Car.* II. * chap. 15.

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* Intituled "An act for the better ſettlement of the maintenance of the parſons, vicars, and curates, in the pariſhes of the city of *London*, burnt by the fire."

The queſtion was, whether the great ſeal has an authority under this act to iſſue ſuch warrants as is prayed, if the lord mayor, upon an application to him, refuſes to iſſue one.

Savage and *Wood*'s caſe.

The counſel for the petitioner, in ſupport of the authority of the great ſeal, cited the * caſe, "*Ex parte Savage*, Rector of the united pariſhes of St. *Andrew Wardrobe*, and St. *Anne's Black Fryars*; and *Ex parte Wood*, Rector of St. *Michael Royal*, and St. *Martin Vintry*."

Lord

* This caſe came on before Lord *Harcourt* on petition, 29th *October*, 1713, ſetting forth, "That the petitioners had reſpectively demanded of the inhabitants, the reſpective rates and arrears for the houſes, *&c.* in their reſpective occupations, but they refuſed to pay the ſame; and that the petitioners applied to Sir *Richard Hoare*, lord mayor, for ſuch warrants as the act of parliament directed him to grant for levying the ſaid monies, and he refuſed to grant ſuch warrant; wherefore it was prayed, that his lordſhip would grant the petitioners his warrant to levy the ſeveral ſums of money, ſo reſpectively due to them, by diſtreſs and ſale of ſuch goods of the parties ſo refuſing to pay, according to the directions of the act of parliament."

Lord *Harcourt* thinking the matter of the petition of great conſequence to the inhabitants of the ſeveral pariſhes mentioned in the act, as well as to the clergy of the city of *London*, as no ſuch complaint ſince the making of the act had been before made to the Lord Chancellor, or Lord Keeper of the Great Seal, or to any two of the Barons of the *Exchequer*, deſired the aſſiſtance of Mr. Baron *Bury*, and Mr. Baron *Price*; and on 2d *December* following, the matter came on again in their preſence, when it appeared, that ſeveral of the quarterly ſums claimed by the petitioners became due, and in arrear, when the houſes, or other hereditaments, whereon ſuch quarterly ſums were aſſeſſed, ſtood empty, or were in the poſſeſſion of former tenants or occupiers thereof; and a queſtion thereupon ariſing, whether ſuch ſums ſo aſſeſſed upon the ſeveral houſes, within the ſeveral pariſhes mentioned in the act, for making up certain annual ſums of money to be paid in lieu of tithes, were become a fixed or real charge upon the houſes whereon they had been ſo aſſeſſed, ſo that the arrears which became due in the time of former tenants, or when the houſes were empty, might be levied on the ſucceeding tenants; the further

conſideration

Lord Chancellor.

The act of parliament directs, "that the alder- Sect. 4, 5, 6, 7.
men of each reſpective ward within the city of *London*, wherein any of the ſaid pariſhes reſpectively lie, and his deputy, or deputies, and the common-councilmen of each reſpective ward; with the church-wardens, and one or more of the pariſhioners of each reſpective pariſh wherein the maintenance is reſpectively to be aſſeſſed, to be nominated by ſuch reſpective alderman, deputy common council man and church wardens, or any five of them, whereof the alderman or his deputy to be one; ſhall at ſome convenient and ſeaſonable time aſſemble and meet together, at ſome place within each of the reſpective pariſhes, in ſuch reſpective ward, wherein the maintenance aforeſaid is to be aſſeſſed, and they, or the major part of them ſo aſſembled, ſhall proportionably aſſeſs upon all houſes, ſhops, warehouſes, and cellars, wharfs, keys, cranes, waterhouſes and tofts of ground, and all other hereditaments whatſoever, the whole reſpective ſum by this act appointed, in the moſt equal way, that the ſaid aſſeſſors, according to the beſt of their judgments, can make."

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conſideration of the petitions was adjourned to 23 *December*, upon which day the two barons certified their opinion, "That by the ſtatute, the ſums of money which have been duly, according to the directions of the act, aſſeſſed upon the ſeveral houſes, *&c.* within the pariſhes in the act, are became real charges upon the houſes, *&c.* whereon they were ſo aſſeſſed, ſo that the arrears, which ought have been paid by the former occupiers of the houſes, or which became due, when the houſes ſtood empty, may be levied by diſtreſs and ſale of the goods of the preſent occupiers." And Lord *Harcourt* declared, he entirely concurred in opinion with the Barons, and that the petitioners were at liberty to apply to him for warrants of diſtreſs, as prayed by their petition; but directed them firſt to demand from the ſeveral perſons mentioned in the petitions, the reſpective ſums due from them, that they might have an opportunity of paying them without further trouble or charge. 3 *Tr. Act.* Rep. 639, 640.

Another

Another proviſion in this act is, that if any difference ſhould ariſe in the aſſeſſment, and a pariſhioner ſhall find himſelf aggrieved by the aſſeſſing any ſum of money in the manner aforeſaid: "That then upon complaint made by the party grieved, to the lord mayor and court of aldermen, they ſummoning as well the party grieved as the alderman, and ſuch others as made the aſſeſſment, ſhall hear and determine the ſame in a ſummary way, and the judgment by them given ſhall be final and without appeal."

After ſettling the manner of making aſſeſſments, and no appeals, then comes a clauſe that directs, upon refuſal of the inhabitants of the reſpective pariſhes to pay to the reſpective incumbents any ſum reſpectively payable, how the ſame ſhall be levied.

Sect. 11. "That it ſhall and may be lawful for the lord mayor of the city of *London*, for the time being, upon oath to be made before him of ſuch refuſal, to grant a warrant for the officer appointed to collect the ſame, with the aſſiſtance of a conſtable, in the day time to levy the ſame tithes or ſums of money ſo due and in arrear, by diſtreſs and ſale of the goods of the party ſo refuſing."

Then comes the proviſoe which gives juriſdiction to the great ſeal.

Sect. 12. "Provided that in caſe the lord mayor or court of aldermen ſhall refuſe to execute any of the reſpective *powers* to them by this act granted, or to perform all and every ſuch thing relating either to the aſſeſſing or levying of the reſpective ſums aforeſaid; that then it ſhall be lawful for the Lord Chancellor as lord keeper of the great ſeal for the time being, or any two

two or more of the barons of his Majeſty's court of *Exchequer*, by warrant under his or their reſpective hands and ſeals, to do and perform what the ſaid lord mayor and court of aldermen, according to the true intent and meaning of this act, might or ought to have done, and by ſuch warrant either to empower any perſon to make the reſpective aſſeſſments, or to authorize the reſpective officers appointed to collect the ſums aforeſaid, to levy the ſame by diſtreſs and ſale of the goods of any perſon that ſhall refuſe to pay in manner and form aforeſaid."

I muſt take it here as if the aſſeſſment was made.

The authority of the great ſeal does not extend to every caſe under this act, but only where there has been a refuſal by the lord mayor, *&c.* to execute the powers granted to them; there the Lord Chancellor, or, *&c.* for the time being, is to iſſue a warrant, *&c.*

Here the lord mayor has heard the parties, and is of opinion not to grant a warrant.

In one caſe the act did not intend to leave the miniſter ſo far in the power of common-council-men and church-wardens, as to abide by their determination, but he has his appeal; and it does not only give an appeal to the miniſter, but to the inhabitants; for the words are "if any variance or difference in the *aſſeſſment*, and a pariſhioner ſhall find himſelf aggrieved, *&c.* and lord mayor's determination is final there." Statute of 22 & 23 *Car.* II. chap. 15.

In the other caſe, where there is no controverſy about the aſſeſſment, but a refuſal to pay; and though the

the words are "ſhall and may be lawful," yet that is imperative upon the lord mayor, if a juſt demand.

In caſe of any variance or difference in the aſſeſſment, between the miniſter and pariſhioners, and appeal to the lord mayor, the court of *Chancery* or *Exchequer* have no juriſdiction, unleſs the lord mayor refuſes to take cognizance, becauſe that would be refuſing to execute their own power; but if they have entered into the conſideration of the grievance in any manner, their appeal would be final.

In the preſent caſe the only act the lord mayor was to do, was to iſſue a warrant; he has refuſed it; and unleſs I enter into the queſtion, whether the lord mayor ought to have iſſued a warrant, I can never judge whether he had a power to do it or no.

Here is, as it appears to me, a plain diſtinction in the act of parliament, for this warrant muſt have been founded upon an aſſeſſment; and as to the pariſhioners, if the lord mayor had iſſued a warrant improperly, an action of treſpaſs would have lain againſt him, and that might have been his reaſon for refuſing it.

Upon the whole, I think this court has a juriſdiction to inquire, whether the lord mayor has done right in refuſing the warrant; and if of opinion he has done wrong, I can iſſue my warrant for levying the ſums aſſeſſed; and his lordſhip gave directions accordingly.

There being a diſpute, whether part of the premiſes were liable to the aſſeſſment; by conſent of all parties, the court referred the deciſion to arbitrators.

Trinity Term, 22 and 23 Geo. II.

July, A. D. 1748.

In *Chancery*.

Stockwell againſt *Terry*.

THE bill was brought by a rector, for payment of tithes in kind of three hundred acres of land.

By 2 *Edw.* VI. chap. 13. lands in their own nature not fit for tillage, pay no tithes for ſeven years after improved: but if not fit for tillage, by reaſon of wood, &c. they pay tithes preſently after improvement. *Vern.* Rep. 115. pl. 56.

Two bars were ſet up; the firſt general to all the acres, the ſtatute 2 *Edw.* VI. chap. 13. by which waſte ground, improved into arable or meadow, ſhall not pay tithes, till ſeven years after the improvement is compleated; as to which, the caſe appeared, that the land in queſtion was a common field for ſheep, horſes and cows, but not fit for fattening them, being over-run with bruſh-wood, briars, and other weeds, the parſon was intitled to tithes of calves, milk, wood, *&c.* out of it, and it was proved to be worth two ſhillings an acre before it was improved.

The ſecond was particular to forty-eight acres, parcel thereof, as to which an agreement had been entered into between the defendant and the parſon, and thoſe who had right to feed on the common, for making an incloſure, and an act of parliament was paſt for that purpoſe, by which they enjoy all their rights in ſeveralty, as they did the right of common before. Theſe forty-eight acres were allotted to the defendant, in lieu of his common, and the queſtion was, whether this was ſtill covered by a *modus*, which had been paid for it before?

For

For plaintiff; This land was not within the ſtatute, for it muſt be *naturâ ſuâ ſterilis*, 2 *Inſt.* 656. and the caſes there put, which are much ſtronger than the preſent, *Cro. El.* 475. 1 *Roll.* Rep. 354. 2 *Bulſ.* 103. and 6 *Mod.* ſhew, that the ſtatute intends only ſuch lands as were merely barren, and made good by induſtry; and if it yielded any profit before, as wood, &c. it is not within it; this ground yielded profit before; and cattle were kept on it, which could not be, if it was waſte.

As to the *modus*, theſe forty-eight acres are of another nature, and not to be covered by it; if there is a *modus* for any thing, and a new part adjoining to it, that addition muſt be paid for; as if a *modus* for two mills, and a third is added, the *modus* will not cover it; ſo if for a garden, and any addition is made to it; if a buck and a doe are paid for a park, if diſparked, tithes muſt be paid for it.

See *Hardcaſtle* againſt *Smithſon*, under *Trinity* Term, 18 *Geo.* II.

For defendants: This act was made to encourage agriculture by the not loſing a tenth of the improvement, altho' the land yield ſome fruit; yet if barren, *quoad agricultaram*, it is within the ſtatute, which muſt mean ſuch lands as are not fit for agriculture, without conſiderable expence; as a recompence for which, this encouragement is given. Defendant has been at great expence in cleaning and improving this ground, and will not have the benefit of it, if to pay tithes the firſt ſeven years.

As to the agreement, the general view of it, and the act of parliament, was, that none ſhould be prejudiced, and that it ſhould be exactly in the ſame ſituation as before, except that it ſhould not be in common; but the conſtruction contended for, will give

give the parſon, whoſe former right was preſerved, what he had not before.

Lord Chancellor.

If there had been a ſuit in the eccleſiaſtical court, and defendant had pleaded the ſtatute as here, and plaintiff denied that this was within it, there muſt, by the nature of their juriſdiction, have been a prohibition for want of a trial, and it would be afterwards tired; but this court is not ſo bound; it is to judge of fact as well as law, otherwiſe every *modus* muſt be ſent to trial; but there are many decrees here, and alſo in the *Exchequer* for payment of tithes for want of proof of a *modus*; for ſomething ſhall be laid to induce a doubt, otherwiſe it would be putting the parties to unreaſonable expence. In this caſe, ſound diſcretion ſhould be uſed; for by too ſtrict a conſtruction, the court might bring a burthen upon the party improving, which would alſo tend to empoveriſh the church; for by theſe improvements livings are made better; and though the preſent incumbent was not capable of tithes for ſeven years, yet after that time the profit will be increaſed. On the other hand, it will greatly prejudice the incumbent, to call land in ſome degree fertile, barren land; for he will thereby be deprived of his tithes; it muſt be guided by the determinations made on the act, all which have been agreeable to Lord *Coke*'s Comment, 2 *Inſt.* 655. where the rule laid down is, if land is in its own nature ſo barren, as not to be proper for agriculture, after it is improved, it ſhall not pay tithe; but if, in its own nature, it is fit for tillage, but by reaſon of wood, or other accidental circumſtance, it was not turned into tillage before, upon the taking away that accidental circumſtance, it ſhall pay tithes preſently on being turned to tillage, for the act does not conſider the expence;

expence; but that you may by poſſibility be paid, as by the timber, underwood, &c. but if afterwards this land will not produce, unleſs dunged or chalked, the court has conſidered this as evidence of its being barren in its own nature, and not proper for corn, without additional improvement. It is admitted, that this land produced three crops of corn, without any thing but ploughing; but objected, that chalking will be neceſſary; and ſo it may be in the courſe of common huſbandry. But the queſtionis, what was neceſſary for the firſt crop? The way of arguing for defendant would throw the expence upon the firſt ſeven years; whereas the benefit is to continue for ever. There is an expence in gaining land from the ſea; yet no ſeven years allowed, though overflown time out of mind, becauſe the benefit is laſting; but if an additional expence is neceſſary to make it produce the firſt crop, ſeven years ſhall be allowed, it is admitted, that this land is not barren, and there is much land which can neither be called fruitful or barren that pay tithe.

Common incloſed by agreement covered by former modus.

As to the forty-eight acres, I am of opinion, that in this caſe they are covered by the *modus*. I admit the caſe mentioned, and that by diſparking the *modus* is gone; and if the owner diſparks part, he ſhall pay the ſame *modus*, and alſo tithes in kind for what is diſparked, becauſe it was paid in nature of a franchiſe, and not for lands. But ſuppoſe the owner, with conſent of the parſon, diſparks ſome to be enjoyed as before: I ſhould think it was the incumbent's intent, that it ſhould be ſtill enjoyed as part of the park, and no tithes in kind ſhall be paid for it; for otherwiſe the agreement with the parſon would be uſeleſs. So if this agreement had been between a lord of the manor, and the other commoners, without

out the parſon, and they had turned it into ſeveral ownerſhips, it would be liable to the right to tithes which the rector has over the whole pariſh. But here has been an agreement by an act of parliament, to which the parſon was party; and although the recital uſes only general words, yet it ſhews plainly the intention of the parties to be, that every perſon ſhould enjoy his allotment in the ſame manner as he did the thing in lieu of tithes, and that was ſubject to the *modus*.

Let the bill therefore be diſmiſſed as to the forty-eight acres; and as to the reſt, an account be taken of the ſeveral tithes to be paid, and the plaintiff (except as to the proof of the *modus*) have his coſts; for I never knew a decree for an account of tithes without coſts, unleſs there was a tender.

No decree for account of tithes, without coſts, unleſs a tender.

Trinity Term 23 & 24 Geo. II.

A. D. 1749.

In the *Exchequer*.

Carthew againſt *Edwards*.

EDWARD Carthew, clerk, rector of St. *Mewan*, in *Cornwall*, brought his bill in the *Exchequer*, (amongſt other particulars) for the tithe of milk.

Pariſhioner ought to milk tenth meal of his cows in veſſels of his own, at place and in manner he milks the other nine meals, and the parſon ought to fetch it away in his own veſſels. 3 *Burn's* Eccleſ. Law, 467, 468.

The defendant *Edwards*, in his anſwer, ſet forth, that the plaintiff having declared he would not ſend for or fetch the tithe milk, he did order every tenth meal of his cows to be turned upon the ground, it

not being uſual or cuſtomary for the pariſhioners of the ſaid pariſh to carry their tithe milk home to the rector.

The court, upon hearing the cauſe, and ordering two decrees in the ſaid court to be read, wherein *Dodſon* was plaintiff, and *Oliver* defendant, [which ſee under *Eaſter* Term, 8 *Geo.* I.] did declare that the defendant ought to have milked the tenth meal of his cows in veſſels of his own, at the place and in the manner he milked the other nine meals, and that the plaintiff ought to have fetched it away in his own veſſels.

Same Caſe, ſame Term.

Tithe of wool of lambs due, tho' the parſon had received the tithe of the lambs in their wool. 3 *Burn's* Eccleſ. Law, 462.

THE plaintiff brought his bill (amongſt other things) for the tithe of the wool of lambs.

The defendant anſwered, that he apprehended no tithe of lambs wool to be due, the plaintiff having received the full tithe of the lambs in their wool.

But, by the court, it was declared, that the tithe of the wool of lambs was due to the plaintiff; and decreed accordingly.

Trinity

Trinity Term, 24 & 25 Geo. II.

June 27, A. D. 1750.

Philip, Lord *Hardwicke**, Lord Chancellor.
Sir *John Strange**, Maſter of the Rolls.

Baxter againſt *Knollys*.

THE bill ſought a partition of tithes and caſual profits in the *Iſle of Wight*.

Demurrer thereto; and 5 *Co.* cited, that there were no caſual profits, and that it may be divided by writ of partition.

Demurrer to bill for partition of tithes over-ruled. *Vern.* Rep. 494. pl. 399.

Lord Chancellor.

An ejectment will lie of tithes, of which the execution is a writ of poſſeſſion; and the ſheriff may do as much on partition, as on a writ of poſſeſſion on ejectment. This is not caſual, whether tithes will ariſe or not. I do not doubt but this court can divide them, as it may ſeveral things, which cannot at law. Over-rule the demurrer.

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* See theſe names in the Index to the "*Nomenclature of Weſtminſter-Hall*, which is ſubjoined to the Biographical Hiſtory of Sir *William Blackſtone*, octavo, Edit. 1782.

Michaelmas Term, 25 Geo. II.

December 15, A. D. 1751.

In *Chancery.*

Walton againſt Lady *Mary Tryon.*

Tithes not due of the loppings of trees not of twenty years growth, though the trees of that age were lopped before; for if a tree be once privileged from paying tithe, the privilege extends to all future loppings, of whatever age they are. 3 *Burn's* Eccleſ. Law, 440. 5 *Bac.* Abr. 59. pl. 78.

THE plaintiff brought his bill as rector of *Mitcham*, in *Surry*, for the tithes of the tops of old pollard oaks, aſhes and elms, and of the tops, lops, and bodies of beeches.

Mr. *Wilbraham* * argued for the plaintiff.

Silva cædua.

The tithe of wood is certainly payable, and the law, as to this, is now pretty certain; the 45th *Edw.* III. is an explanatory law, and all lops and tops are titheable, if the tree be under twenty years growth; before the ſtatute of *ſilva cædua* all were titheable; but by that law it is declared, that all timber trees ſhould be exempt; and the reaſon is plain, for timber trees yield but one profit, and that but once in a century; and therefore as it was ſo long before the owner had a profit, that wood was exempt; but even by this act it was not meant, that the whole tree was exempt, the body only, not the tops and lops, were ſo. Since this act, the courts have gone ſo far, as to exempt all parts of the tree, and even germins from theſe trees have alſo been determined to be exempt. After this, the courts endeavoured to bring it to ſome rule, and the buyers

* See his name in Index to the "Catalogue of the Works of Sir *William Blackſtone*," ſubjoined to "The Biographical Hiſtory of Sir *W. B.*"

were

were alſo to pay the tithes; afterwards the court held, that trees, not converted to the uſe of timber, were titheable, and on this ſome caſes have been determined.

In the caſe of *Briggs* and *Martin*, *Eaſter* Term, 6 *Will.* III. a bill was brought by the plaintiff, as leſſee of the rectory of *Bromley*, in *Kent*, for tithe wood made into bavings; the defendants, by their anſwer, inſiſted, that old pollards and dotards paid no tithes; but, notwithſtanding this, the court decreed an account and ſatisfaction to the plaintiff for them. *Briggs and Martin.* *Old pollards and dotards pay tithes.*

The courts ſeem to have gone a ſtep further, they have had regard to the uſe made of wood, and not to the age of the pollard, namely, what was uſed for timber, and what for fire wood; the former was held to be exempt, the latter to pay tithes; and agreeable to this was the caſe of *Greenaway* and the Earl of *Kent*, before the Lord Chief Baron *Ward*; the bill was brought by the plaintiff as vicar of *Walford*, in *Herefordſhire*; the defendant inſiſted, that no tithes were due of ſuch wood as was above twenty years growth; a croſs bill was brought, and, on hearing, the court declared, that the plaintiff was intitled to the tithe of all wood above twenty years growth, as well as under, which was corded, but not otherwiſe. *Greenaway and Earl of Kent.*

But it may be objected, ſhall tithes be ſo uncertain as to be determined by the uſe of them? I anſwer, that, in many caſes, tithes muſt depend on the uſe of them, as in wood, if it is made into bavings for firing, it is titheable; if to make fences, it is not ſo; ſo if one fats cattle on land, agiſtment is due

for them; ſo if he keeps cattle as barren, tithes are paid; but cattle kept for the plow are exempt. Theſe are all eſtabliſhed caſes, and do not want any confirmation.

Brook and Rogers.

The caſe of *Brook* and *Rogers*, *Moor* 908. is very expreſs, that if timber is lopt before twenty years growth, tithes ſhall be paid of the loppings; and if theſe trees in queſtion have been conſtantly cut, and tithes have been paid of them without any contradiction, (as is now in proof) why is not this an evidence, that theſe trees were cut before twenty years growth, and ſo out of the ſtatute of *ſilva cædua?* and this preſumption may more naturally ariſe in this caſe, for the falls have happened but once in ſixteen or twenty years; and one of the plaintiff's witneſſes ſpeak to tithes being paid of theſe trees forty-five years ago, without any moleſtation whatſoever; and there is not one witneſs produced for the defendant, who will venture to ſwear, that ever one load of timber was cut without paying tithes; and if this be the caſe, the natural preſumption is, that this wood is titheable, for it has paid tithes as long as memory can go back: as to the *beech*, if it be timber, as inſiſted upon by the defendant, then it comes within the ſtatute of *ſilva cædua*; and this matter muſt be tried, if the parties think it worth their while to diſpute it.

By Mr. Solicitor General for the defendant:

The queſtion now put is, whether the tops and lops cut from trees above twenty years growth, are liable to pay tithes, if cut in order to be uſed for fuel; and this is a queſtion of a very extraordinary nature indeed, and contrary both to old and modern law; for no point was ever laid down more clearly,

from the time of *Edward* the *Third* to the preſent time, than this, that tops and lops of trees above twenty years growth, are always exempt; and the reaſon is, when once it is privileged, it always remains ſo: the caſe in *Moor* 908. cited for the plaintiff, is expreſsly for the defendant; for that particularly ſtates, that if not cut within the twenty years, then it is exempt; and ſo have been abundance of other caſes; and how can the *right* of the parſon ariſe from the *uſe* of the thing? How is it poſſible for the parſon to know the owner's intent? The right, therefore, ought to commence from the time it is cut and ſevered. The Earl of *Kent*'s caſe does not prove the preſent diſtinction; for that proves, that the trees themſelves were in queſtion, and nothing at all was ſaid of the lops and tops; beſides, they were not pollards or dotards, but young oaks; this proves, that all trees cut down and uſed for fire, would be liable to tithes; but this proves too much: But there is a note on the back of Mr. *Brown*'s brief in that cauſe (which I have) that ſettles what this caſe was; he ſays, there was poſitive evidence, that the trees corded had grown from the ſtems of old wood, and was formerly coppice wood; and this will alter the caſe greatly.

The caſe of *Layfield* and *Cowper*, *Trinity* Term, A. D. 1698, was on a bill for tithes of lops and tops of timber trees; the defendant inſiſted that they were the produce of beech and aſh trees, he admitted that he did convert them to fuel and cord wood; but, in regard they were above twenty years, inſiſted, that they were exempt: by the decree an account was directed for wood in general, and exceptions were taken to the remembrancer's report, that he had taken no notice that theſe beeches were ſome thirty, ſome *Layfield and Cowper.*

fifty years years growth, and were timber, and therefore exempt; and of that opinion was the court.

Bibley and *Huxley.*

In the caſe of *Bibley* and *Huxley*, *Hilary* Term, A. D. 1724, the bill was for tithe of coppice and other wood, the defendant inſiſted that he had felled ſeveral timber trees of twenty years and upwards, and had dug up ſeveral roots, and made them into ſtacks, and made the tops into faggots; ſome were uſed for repairs, others for fuel; and as theſe were all above the age of twenty years, the body with all the reſt are exempt from paying tithes by law; and it was decreed that the plaintiff ſhould have an account of the tithe wood, except for the tithe of oak, aſh, and maiden trees of beech proceeding from ſtools above twenty years growth; the application therefore to fuel, does not make the difference.

But it is objected, that it muſt be preſumed theſe trees now in queſtion were cut before twenty years growth, and therefore never had the privilege; but as that is not charged by the bill, it cannot be preſumed; as to the beech, if inſiſted on, it muſt be tried.

By the Lord Chancellor *Hardwicke.*

The tithes demanded by the bill, are of two ſorts; firſt, tops and lops of old pollard oaks, aſhes, and elms; ſecondly, beech trees, both body and branches; the principal queſtion ariſes on the tops and lops of old pollard oaks, and the reſt; there is no difference in point of fact; it is admitted on both ſides, that there is no coppice wood in this ground, that they are ancient pollards; and as to the beeches, that they are of twenty years growth and upwards, and the greateſt part of them was cut and made into billets,

billets, and ſold for fire, except a ſmall part of them which was uſed for poſts and rails; the plaintiff has proved, that at two former falls, tithes were ſet out and taken of this wood, the one in 1712, the other in 1728; on the other hand the defendant has not proved any fall when tithe was not paid; but has proved that in thoſe two falls the family lived in *Northamptonſhire*, and knew nothing of their being ſet out and taken, and that no other wood in the pariſh does pay tithe, or ever had paid.

The plaintiff has founded his right on this: namely, the *uſe* and application of the things of which tithe is demanded; but though this be the general right ſet forth in the bill, yet if any other right appears, the plaintiff will be intitled to an account.

Though general right only ſet out in the bill, yet, if any other right appears, plaintiff will be intitled to an account.

This is a queſtion of very great conſequence, both to the owners of wood, and to the clergy alſo, and has been argued both from *reaſon* and *authorities*; and upon the reaſon of the thing, it has been ſaid, that there is no more reaſon why tithes ſhould not be paid of wood, than of any other product of the earth, for it *annuatim renovat*; but this proves too much; for, according to this reaſoning, all wood in general would be liable, and though this does *annuatim creſcere*, yet it does not *annuatim renovare*; at common law coppice wood is ſubject to tithes, though it does not *annuatim renovare*, yet in its nature it ought to pay, for it is cut under a certain courſe of years, and is looked upon as an ordinary ſtated renewal, like the caſe of ſaffron; but of timber trees the ſtated rule is otherwiſe; there the law does not wait for a ſtated courſe of felling: it was further reaſoned for the plaintiff, that the lops and tops of pollards are tenancy profits; but this is no rule of tithes, and varies

Saffron.

Timber trees.

varies in different counties, and would make the affair of tithes very uncertain; and in many places the lops of ſpiral trees are allowed to tenants for fire wood, and yet ſuch lops are not tithable.

It was further ſaid, to be reaſonable, that the *uſe* and application ſhould determine, whether the thing was tithable or not; that as a coppice is liable, ſo it is reaſonable, that every other wood, not timber, but uſed for fuel, ſhould be ſo too; but this goes to the queſtion put in iſſue by the bill, and I am afraid would be a very dangerous innovation; the ſubſequent uſe of the thing, as it does not alter the nature, cannot give a titheable quality, which it had not before, if it could, why not *vice verſâ*, that is to ſay, if wood, not timber, ſhould be applied to the uſe of timber, why ſhould not ſuch uſe exempt it from the payment of tithes? this was never heard of, yet it is equally reaſonable; it is ſaid, there are certain caſes where the uſe and application of the thing ſhall make it titheable, and there will appear no greater uncertainty in one caſe than the other, as for inſtance, wood cut to be burned in the houſe of a pariſhioner, this was ſaid to be not titheable, but that is not true, unleſs by cuſtom, for it was otherwiſe determined in the caſe of *Norton* and *Fermer*, *Cro. Car.* 113. it was ſaid alſo, that cattle for the plough and pail are not titheable, ſo there the uſe determines; but this is not a predial but a mixt tithe, which the pariſhioner is not obliged to ſet out at a particular place or time, and the parſon receives it in another manner, by taking the tenth part of the profits.

Norton and *Fermer*.

Tithe of wood is a predial, not a mixt tithe.

In many caſes it is impoſſible to ſay, to what uſes the wood may be applied, the owner may fell it ſtanding, the buyer to cut it, and if ſo how is the intention

tion to be known? and in many counties where timber is very plentiful, there it is often cut down and uſed as fuel; and if the uſe and application was to prevail, it would make two different common laws of tithes, and this without any cuſtom; the law for tithes of wood is a poſitive law, to wit, that of all timber trees of twenty years growth or upwards, whether timber by law or cuſtom, no tithe is to be paid, either of bodies, lops, or tops.

Silva cædua has declarative law

It has been much controverted whether the ſtatute of *ſilva cædua* is a new law, or only declaratory of the common law; the latter is now the ſettled opinion, for the words of the ſtatute are, "it hath been uſed of *old*;" in the ſtatute the wood is particularly mentioned, and its age and growth, but not one word is ſaid of the uſe; and the opinion of all the courts, upon the conſtruction of this ſtatute, has been, that where the tree is timber, by law or cuſtom, of twenty years growth or upwards, it is exempt; and in 2 *Inſt.* 642, 643. the rules are very particularly laid down; theſe rules have not been contradicted, except in the caſe of germins that came from old ſtools, or roots of trees, that have been felled, and which is the caſe of moſt coppices in *England*, are liable to the payment of tithes; but it is aſked what difference is there, if germins grow from trees intirely cut down, or from trees that have been lopped? I anſwer, that the difference is great; for in the caſe of germins that come from ſtools, no tree remains from whence the privilege is derived; but in caſe of lops the tree remains, and ſo does the privilege.

5 *Bac.* Abr. 60. pl. 82. 3 *Burn's* Eccleſ. Law. 444, 445.

I come now to conſider the *caſes* cited againſt this doctrine by the counſel for the plaintiff. The caſe of

Man

Man and *Somerton*. *Hawes* and *Cornwall*.

Man and *Somerton*, *Brownl.* 94. is not applicable to the preſent caſe; the caſe of *Hawes* and *Cornwall*, 1 *Lev.* 189. is this, "wood cut for firing, though above 20 years growth, ſhall pay tithes, and ſo pollards of above fifty years;" but this is very ſhort, and imperfectly ſtated, and is not ſupported by law at all; and by report of ſame caſe in 1 *Sid.* 200. it is ſaid, that the word was coppice wood, which had been uſually felled for firing; and by the determination, moſt probably it was ſo and therefore proves nothing for the plaintiff; for the caſes do not conclude to the point, becauſe ſuch wood, of what age ſoever it be, is titheable.

5 *Bac.* Abr. 59. pl. 74. 3 *Burn's* Eccleſ. Law, 445.

But it is ſaid there is no difference between pollards and underwood, for pollards are not timber; but I anſwer, that pollards having gained this privilege always retain it, and the bodies of pollards may ſerve to many uſes as timber doth; and if dotard trees are privileged, much more ought pollards.

Briggs and *Martin*.

The next caſe cited was that of *Briggs* and *Martin*, which was on a bill for lops and tops of old pollard and dotard trees, and an account was accordingly directed; but on what this was founded does not appear, nor whether theſe pollards were under the time of privilege or not; and what makes this caſe the more extraordinary is, that the decree in the caſe of *Northley* and *Colbe*, in the very next term, is directly contrary; and the only way of reconciling theſe two caſes is, that in the firſt caſe it muſt have appeared, that the pollards were cut before twenty years growth.

Greenaway and the Earl of *Kent*, 5 *Bac.* Abr. 59. pl. 74. 3 *Burn's* Eccleſ. Law. 445.

Greenaway and the Earl of *Kent* [which ſee under *Hilary* Term, 8 *Geo.* I.] was the next caſe, and moſt

moſt principally relied on, and the ground of this decree was, that all wood even above twenty years, that was cut and corded, ſhould be titheable, and goes further than any caſe before or ſince; but the Lord Chief Baron *Ward* in that caſe was of a quite different opinion, and made a learned argument againſt the decree; but the other three barons differed from him, therefore I obſerve this was not an uniform judgment, and I think the Chief Baron *Ward*'s was the beſt opinion; Baron *Price*'s reaſons in that cauſe do not ſatisfy me at all; when he was conſidering the ſtatute of *ſylva cædua*, he ſaid, that ancient ſtatute muſt be conſtrued according to the intent, and not literally; and that *great wood* does not in its ſtrict ſenſe mean trees of this ſort, but ſuch wood as is applicable to large buildings; which is in effect to ſay, that a tree, which in its nature is timber, yet if it is not large, and is applied to firing, ſhall be titheable; another ground that he went upon was, the ſtatutes relating to the rules of felling of wood but theſe are rules laid down only for the preſervation of timber, and cannot be applicable to tithes that are demanded of them; and upon the whole this determination is directly contrary to all the other authorities, and is not law; for there is a *tempus conſtitutum*, and that cannot be departed from: and I will ſay further, that there has been no prececent ſince to follow it; for in the caſe of *Bibie* and *Huxey*, [which ſee under *Hilary* Term, 10 *Geo.* 1.] which was ſubſequent thereto, it was agreed, that tithe is not due of the wood of a timber tree, which has been once privileged from the payment of tithe; this caſe therefore is rather againſt it.

5 *Bac.* Abr. 59. pl. 74.

Bibie and *Huxey* 5 *Bac.* Abr. 59. pl. 74.

If theſe trees now in queſtion were lopped and made pollards before twenty years growth, and ſo have

have continued to be lopped, then they will be liable to tithes; but this is a queſtion of fact proper to be tried, being too much for me to determine upon the evidence now laid before the court; I am rather inclined to think they were not, for the plaintiff himſelf in his bill has ſtated them to be ancient *pollards and large.

The ſecond queſtion relates to the tithes of *beeches*, both bodies and branches; and it is not diſputed, but that this wood is above twenty years growth; and then the matter of fact muſt be tried, whether it is timber by the cuſtom of the country; and if ſo, it will be exempt, otherwiſe it muſt pay tithes.

5 Bac. Abr. 59. pl. 78. In this caſe it appeared, that the loppings of the trees, for the tithe of which the bill was brought, were not of twenty years growth; but it appearing, that the trees were of the age of twenty years, before they had ever been lopped, it was *decreed* by Lord Chancellor *Hardwicke*, that tithe was not due of the loppings, for that if a tree be once privileged from paying tithe, the privilege extends to all future loppings, of whatſoever age they are.

5 *Bac.* Abr. 59. pl. 80. It was laid down by Lord *Hardwicke*, Chancellor, that if a tree was lopped, before it was of the age of twenty years, all future loppings, of how many

* After all, it muſt needs be difficult oftentimes preciſely to determine the age of oaks, aſhes, and other trees; which ſpring frequently from ſeeds ſhed upon the ground, of which no account is or can be kept by the owner, or any other; in many places, where wood is plentiful and grows freely, it is the cuſtom to eſtimate the ſame by meaſuring round the middle part of the tree; and if is twenty-four inches in circumference, it is deemed of twenty years growth, if *under* that meaſure, if is accounted *underwood*. 3 *Burn*'s Eccleſ. Law 446.

years

years growth ſoever they may be, are liable to the payment of tithe; and that if when the wood of a coppice is felled, ſome trees growing therein, which are of the age of twenty years, and have never been lopped, are lopped, and the loppings are promiſcuouſly bound up in faggots with the coppice wood, tithe muſt be paid of the whole; for that it would be very difficult to ſeparate the titheable wood from that which is not ſo, and the owner ought to ſuffer for his folly, in mixing the latter with the former.

5 *Bac.* Abr. 60. pl. 84.

The bill was diſmiſſed.

Michaelmas Term, 25 Geo. II.

A. D. 1751.

In *Chancery.*

Walton and *Tryon.*

THE bill was brought by the plaintiff (amongſt other things) for the tithe of rabbits, in a warren called *Aſhurſt*'s warren, and he proved by the former incumbent's books, that the ſame had been compounded for, by payment of twenty ſhillings in money, and four couple of rabbits; for the plaintiff it was argued, that it is a great queſtion, whether this be a predial, mixt, or perſonal tithe: cuſtomary tithes are generally deemed perſonal tithes; and if ſo, then a payment in lieu of tithes will be good; rabbits are of that nature, that it is difficult for the perſon to get them; the times of taking them uncertain

On a bill for tithes of rabbits, iſſue directed on proof that ſame had been compounded for, by payment of 20 s. in money, and four couple of rabbits.
3 *Burn's* Eccleſ. Law, 468.

certain, and therefore a ſmall compoſition probably was taken for them; ſuppoſe a compoſition was made for hay originally at five pounds, and afterwards a new agreement was made for four pounds, and one load of hay; this would be good, and an *aſſumpſit* would lie; the parſon's book proves, that ſeveral couple were paid, and money alſo; and that book is always held to be good evidence.

For the defendant, it was anſwered, that this tithe can only depend on a cuſtomary immemorial right, and ſo ought to be laid in the bill; here it is laid to the tenth of the rabbits in kind, and the plaintiff demands it as ſuch; but this evidence is directly contrary, for by that he proves a compoſition in lieu of tithes for them; therefore as his evidence contradicts his manner of laying his preſcription, he muſt fail in his ſuit; as to the rector's book in this caſe, it is very modern, for it goes no further back than the year 1728; this indeed may be evidence of payment, but it can never be admitted as an evidence to ſupport the right.

By the Lord Chancellor *Hardwicke*,

The plaintiff by his bill demands tithes in kind, but there is no evidence of that; the evidence offered is, that four couple of rabbits have always been ſent and delivered at the parſon's houſe by the warreners, and twenty ſhillings a year paid, and ſo proved by the former incumbent's book; and the argument by the plaintiff from this evidence is, that this is a compoſition for tithes in kind; and rightly argued, for the *modus* would be too rank; but the great thing with me is this twenty ſhillings a year; for the four couple of rabbits can be neither *modus* nor

nor compoſition; indeed, payment of part of a thing in money, and part in kind, has been held to be good; but I can determine nothing on this queſtion, but it muſt go to be tried as to the cuſtom.

In the *Exchequer*.

Jonathan Tyers, —— Plaintiff.

Philip Walton, Clerk, Rector of *Mickleham*, and Vicar of *Darking*, in the county of *Surrey*, } Defendant.

MR. *Tyers* having planted a conſiderable number of acres with hops in the pariſhes of *Mickleham* and *Darking* in *Surrey*, of both which pariſhes Mr. *Walton* was incumbent, offered to pay to him after the rate of twenty pounds an acre for the tithe thereof, which Mr. *Walton* refuſed; whereupon Mr. *Tyers* gave him notice, that on ſuch a day he would begin to gather his hops, and would regularly ſet out every tenth hill through all his hop plantations, as the tithe thereof, by ſevering the bind of the hops from the ſoil, and leaving the ſame on the poles; and that he would in the ſame manner daily ſet out the tithe of his hops, in order that Mr. *Walton*'s agent might be preſent at the reſpective times of ſetting out the tithes, and might carry away the ſame in due time; Mr. *Walton* ſaid, that this method of tithing was new, and contrary to law, and that he would not take the tithe in that manner; but that he expected the whole crop ſhould be gathered, and afterwards meaſured in baſkets, and that every tenth baſket of hops, after being ſo meaſured, ſhould be ſet out for the tithe thereof; this Mr. *Tyers* refuſed to do, and proceeded, according to his notice,

The tithe of hops ought, by law, to be ſet out by meaſure, after the ſame are picked from the bind or ſtem. 3 *Burn*'s Eccleſ. Law, 450. 5 *Bac.* Abr. 76. pl. 30.

to ſet out the tithe in the manner above mentioned, leaving every tenth hill ungathered, having cut or ſevered from the ſoil the binds or ſtems on which the hops on every ſuch tenth hill grew, and renewed his notice daily, whilſt his hop gathering continued.

Mr. *Walton* did not meddle with the tithe, ſo ſet out, and after the hops had continued for ſome months upon the poles, on every tenth hill, as aforeſaid ungathered, and ſo became ſpoiled and rotted, Mr. *Tyers* brought an action for damages againſt Mr. *Walton*, for as much as he was hindred thereby from dreſſing and cultivating his hop plantations.

Upon this, Mr. *Walton* filed his bill in the *Exchequer* againſt Mr. *Tyers*, thereby inſiſting, that the manner in which Mr. *Tyers* had ſet out the tithe of his hops, by leaving the hops on every tenth hill, and ſevering the binds from the ſoil, was not a proper method for ſetting out ſuch tithes; but that the tithe of hops ought by law to be ſet out after the ſame are picked from the bind or ſtem; and on the hearing the court declared, that the method of tithing hops inſiſted on by his anſwer, is not a good ſetting out of the tithe of hops, but that hops ought to be picked and gathered from the binds before they are titheable.

Eaſter

Eaſter Term, 27 Geo. II.

May * 17, A. D. 1753.

* 15. 5 *Bac.* Abr. 76. pl. 30.

In the Houſe of Lords.

Wolton and *Tyers.*

MR. *Tyers* appealed to the Houſe of Lords, ſetting forth that the manner of ſetting out the tithes, by the admeaſurement of the hops in baſkets, would be very prejudicial and inconvenient to both parties, as the hops by that means would be neceſſarily bruiſed, the flower and condition thereof hurt, and the hops thereby very much damaged; that it hath been uſual of late years, for hop planters to direct their gatherers to pick or aſſort their hops into different pokes, according to their different degrees of fineneſs and colour, *to wit*, the *fine* and the *brown*; and ſuch aſſortment is the moſt material and expenſive part of the manufacturing of hops, thrice as much time and expence being required in picking and aſſorting hops into two different parcels, as is neceſſary in picking them into one poke, when firſt gathered; and that it is unreaſonable, that perſons claiming tithes ſhould have the benefit of this part of the manufacture of hops, which coſts about five pounds an acre, without making any allowance, or contributing any ſhare to the expence, and praying relief, for theſe (amongſt other reaſons;)

3 *Burn's* Eccleſ. Law, 452. 5 *Bac.* Abr. 76. pl. 30.

Firſt, There is no poſitive law to regulate the manner of tithing hops, neither is it fixed by immemorial uſage or cuſtom; the determinations of courts relating thereto have been various; and therefore that manner of tithing ſeems moſt juſt and equitable,

which is both the leaſt prejudicial to the owner, and moſt beneficial to the parſon or impropriator.

Secondly, The manner inſiſted on by the reſpondent, by picking and then ſetting out the tithes by admeaſurement in baſkets, is ſo very detrimental to the planter, that it muſt inevitably be the ruin of the plantation of hops, the cultivation whereof is of extenſive benefit to this kingdom; the method inſiſted on by the appellant is undeniably fair and equitable, not liable to any fraud whatſoever; whereas the method inſiſted on by the reſpondent is avowedly oppreſſive and injurious, in no wiſe productive of any benefit, or preventive of any fraud.

Mr. *Walton* the reſpondent hoped the decree would be affirmed (amongſt other reaſons) for theſe following:

Firſt, The ſetting out the tithe of hops by meaſure, after they are picked from the bind or ſtem, is the ſureſt and moſt equal method, and liable to the leaſt inconveniences; whereas the method of tithing contended for, by the appellant, by every tenth hill, would be liable to great fraud, in as much as the planter of hops would have a right to ſet out for tithe every tenth hill, to be computed from the place he began at; and he might any year determine before he manured his hop ground, where he would begin to ſet out the tithe, and thereby would certainly know every tenth hill through the whole plantation, and might neglect to manure or improve them ſo much as the other hills, which would be unjuſt and unreaſonable.

Secondly, The method of tithing contended for by the appellant, would give occaſion to many diſputes and controverſies; as the hops growing in one hill

hill are apt naturally to intermix with the hops growing on the hills adjoining, ſo that it is ſcarce poſſible to ſever the one from the other intire; and the owner of tithe, or his agent or ſervants, exerciſing the right of entering into the hop grounds, and pulling up the planter's poles, muſt frequently furniſh matter for ſuits and vexations; which would be inconvenient both to the owner of the tithes, and to the pariſhioners.

Thirdly, The appellant hath not made the leaſt proof, that the tithe of hops was ever ſet out before they were picked from the bind or ſtem, or that they were tithed by the tenth hill, (which is the method of tithing the appellant contends for) but on the contrary, in many inſtances, where the method of ſetting out tithe hops has been diſputed or brought in queſtion, it has been uniformly determined and adjudged, after ſolemn argument, that the tithe of hops by law, ought to be ſet out by meaſure, after they are picked from the bind or ſtem; and the decree was affirmed by the Lords.

Trinity Term, 27 & 28 Geo. II.

July 17, A. D. 1754.

Philip, Earl *Hardwicke*, Lord Chancellor.

Sir *Thomas Clarke*, Maſter of the Rolls.

Chapman againſt *Smith*.

THE bill was brought by the rector of the pariſh of *Altringham* in *Kent*, for payment of tithes in kind, for lands therein.

Modus of nine pence *per* acre, marſh-land, except when ſown

with corn, or planted with hops, not determined without trial. 2 *Ves.* Rep. 506. pl. 174.

The defence ſet up in the anſwer, was a *modus* in this pariſh time out of mind, that all occupiers in the marſh-lands in this pariſh, have always paid, or ought to pay yearly to the rector, nine pence an acre, and no more, for every acre of marſh-land within the ſaid pariſh, and the titheable places thereof, in their reſpective poſſeſſions, except when ſown with corn, grain, flax, or planted with hops, as a *modus*, and in lieu of all tithes of hay and paſture, and all ſmall tithes, except flax, hemp, and hops, and ſo after that rate, for a greater or leſs quantity than an acre of marſh-land.

For the plaintiff it was reſted on the rector's title.

For defendant it was argued, that this was a good *modus*, and well laid, and a caſe cited in the *Exchequer*, in 1726, where a bill was brought by *Richard Bate*, as rector of the pariſh of *Wareborn*, the very next to this pariſh, for tithes in kind; and a croſs-bill by Sir *Charles Sedley* and others, inhabitants of that pariſh, to eſtabliſh a *modus* of one ſhilling for every acre of marſh-land, laying it exactly as the preſent *modus*, two iſſues were directed; and upon the equity reſerved after the trial the *modus* was eſtabliſhed. [See the caſe of *Bate* againſt *Hodges*, under *Hilary* Term, 9 *Geo.* I.] This is a precedent both in law and equity, ſhewing this as a *modus* well laid, and that in a court where this kind of bills are particularly attended to, and anſwers the objection of being too rank, this being laid only at nine pence an acre. In *Evans* againſt *Price* and *Richards*, 26 *October*, 1747, your Lordſhip held, that the rankneſs of a *modus* is not to be judged by compariſon of the ſum to the rent reſerved on the land, but to the value of the land; and that where it was

Evans againſt *Price* and *Richards.*

neceſſary

neceſſary in point of proof, the court would that that matter be tried, but otherwiſe the court itſelf would judge of it: theſe lands lie in *Romney* marſh, to preſerve which the owners are at a very great expence, and therefore it is probable, that they made this compoſition, and then the variation of the land is not a reaſon to ſay, this is a rank *modus*; for the value of lands depends on particular huſbandry, and is uncertain; it is impoſſible to ſay what the value of lands was at the time of this compoſition, and reaſonable to think, a proper valuation was then made, and a proper reſervation, the alteration in different times, from the cheapneſs of money and value of land, would deſtroy all *moduſes* of this kind. In 2 *P. Wil.* 572. this precedent 1726 ſeems to be cited by *Forteſcue* Juſtice, [See *Chapman* againſt the Biſhop of *Lincoln*, under *Hilary* Term, 3 *Geo* II.] and weight laid upon it. As to its not being laid conſiſtent, and impoſſible to be time immemorial, becauſe it excepts hops, things newly introduced, not exiſting at the time this compoſition was ſuppoſed to be made, no ſuch objection was taken in that caſe in the *Exchequer*, and it is not probable it would have eſcaped that court, if ſuch had lain, though the law has determined that hops were introduced in Queen *Elizabeth*'s time into this country; they were probably known and exiſted before, though in ſmall quantities; the exception was introduced for the benefit of the rector, who is ſuppoſed by the *modus* to receive the full value as tithes in kind were then worth; it is not material that all the witneſſes do not call it a *modus*, for it may be laid as a ſum annually paid, without calling it a *modus*; and it is hard to require exact preciſion in traditional evidence; where the *modus* itſelf is reaſonable, rational evidence is a ground for it. There is no evidence of payment of tithes in kind.

This rector and his predeceſſors have agreed to this *modus*.

For plaintiff: The plaintiff need only ſhew, that he is rector, which by law intitles him *primâ facie* to all manner of tithes, unleſs ſome legal bar is ſet up, which here is a *modus*; but it is neither proved in fact, nor good in law, and this is contradicted by records; the difference to the plaintiff is, whether he ſhall receive the whole or half of his tithes? If things of this kind are not broke in upon, the clergy's revenue may be deſtroyed by compoſitions, it depends on this, whether it is ſuch a *modus* as could have commencement beyond time of memory, or a modern compoſition within time of memory. According to Lord *Coke*'s definition, a *modus* and compoſition are the ſame, only that by length of time one is run into ſome thing certain, an abſolute bar, not to be broken by either parſon or occupier. A compoſition is ſuch an agreement as ſince the diſabling ſtatutes muſt be made by the parſon alone, and it may be, and is in general, a running compoſition from year to year, exactly like leaſes from year to year; ſo that on either ſide, if the compoſition is not intended to be continued, you muſt give notice at the beginning of a year; and ſo of a leaſe; a *modus* and compoſition differ materially in this, that one is a certain payment beyond time of memory, the other equally certain, but within memory; the one may be broke by the parties, the other not: a *modus* may indeed ceaſe and revive according to the different *ſpecies* of culture in which the land is employed; and therefore where it is ſet up, that when ſown with corn it ſhall be tithe in kind, when turned into hay, it ſhall be ſatisfied by way of *modus*, courts of law, and this court, have held it may ceaſe and revive; and ſo far

far this *modus* is proper: But the objections to it are, firſt it is rank, and appears ſo large, that it is impoſſible it could be time out of mind. The court will always deſtroy ſuch a *modus* on the face of it, where it runs ſo high, and goes ſo near the value of tithes in kind. Every *modus* certainly preſumes an original agreement before the diſabling ſtatutes, by parſon, patron, and ordinary, and ſince by parſon alone. That commencement then muſt be preſumed conſiſtent with right reaſon, and the court will not preſume that the pariſhioners (in whoſe favour all theſe original contracts between them and the parſon are) made ſuch compoſition as was of more value than the tithes. The payment muſt be always in money; this being paſture-tithe, which is always pecuniary, cannot be *ſpecific*; and the only tithe in the kingdom which is not ſpecific, it is not to be conceived that nine-pence would pay, if the real tithe did not amount to half that. The value of an acre, to ſupport this as a reaſonable compoſition at the time, muſt have been ſeven ſhillings and ſixpence. So high a *modus* creates a ſtrong preſumption, that it was made not beyond time of memory; the law fixes that to a certain period of King *Richard* the *Firſt*, ſince whoſe death it is above five hundred and ſixty-ſix years. This then muſt be preſumed an agreement before that time to pay nine-pence an acre: In fact, in the time of King *Henry* the *Eighth*, theſe lands were valued at two ſhillings an acre, as appears from ſeveral records, particularly from a ſurvey then taken, and now produced out of the Augmentation Office. How long this notion of the rankneſs of a *modus* has prevailed may not be known; but in *Layfield*, rector of *Chiddingfield* in *Surry*, againſt *Delap*, *Hil.* 1697, [which ſee under *Hilary* Term, 8 *Will.* III.] the defendant inſiſted on a *modus* of three-

pence

pence for a lamb. The court held that was too much, and could not be, for that a lamb was not worth two ſhillings and ſix-pence in that country, 2 Lord *Raym.* 1163. ſhews how far back the opinions in the *Exchequer* have gone, and a *modus* was held too high by *Powell* J. and ſeveral afterwards, *Benſon* againſt *Watkins*, *Hil.* 3 *Geo.* I. [which ſee, *ante*, p. 135.] *Franklyn* againſt *Jenkins*, *Trin.* 7 *Geo.* I. [which ſee under *Trinity* Term, 8 *Geo.* I.] yet in 1731, or thereabouts, *Giffard*, rector of *Stoke* in *Surry*, againſt *Webb*, [which ſee under *Trinity* Term, 4 & 5 *Geo.* II.] a *modus* of three-pence for a lamb was ſet up; it was ſent by the Barons *Cater* and *Thomſon* to be tried; and on appeal that decree was affirmed. [ſee *Giffard* and *Webb*, under *Eaſter* Term, 9 *Geo.* II.] It has indeed been ſaid, Lord *Talbot* was againſt that decree. The next objection, and which deſtroys the *modus* on the face of it, is from exemption of tithes of hops, which ſhews it a compoſition, the law taking notice, that they are a modern invention, coming in in Queen *Elizabeth*'s time, though perhaps they exiſted before; for there is a ſtatute in the time of *Henry* the *Eighth*, prohibiting them as a venomous weed. It could not be then an agreement time out of mind, of which the judges take notice, and therefore prohibition was denied, 1 *Sid.* 443. 1 *Ventr.* 61. The exemption muſt be coeval with the preſcription, which preſumes an agreement at firſt by proper authority of patron, rector, and ordinary, to take a pecuniary payment in lieu of tithes in kind. The exemption muſt be taken entire with the *modus*; for the court never ſevers a *modus*, or conſiders one part as good, and another as bad; hops being alledged as part of the preſcription, it is thereby as much *ſolo de ſo* as if laid particularly and preciſely for hops, which is never allowed. In *Perch* againſt *Gee*, *Hil* 1698,

Hops prohibited as a venomous weed, in the time of *Henry* the *Eighth*.

according to Lord Chief Baron *Dodd*'s manuſcript, [which ſee under *Hilary* Term, 9 *Will.* III.] on the bill by the impropriator of the pariſh of *Offham* in *Kent*, the queſtion was, in what manner hops are to be paid, and whether a *modus* could be good of the tithe of hops? And it was held not, no *modus extra ponendi*: So afterwards in *Conner* againſt *Spratling*, *Trin.* 1703, becauſe hopes are a new plantation.

There are but two kinds of tithes, great and ſmall; the great are only four, corn, grain, hay, and wood, all the reſt ſmall, and there can hardly be a new great tithe; and it is now determined fully by your Lordſhip, in the caſe of potatoes, in *Smith* againſt *Wyat*, [which ſee under *Trinity* Term, 16 *Geo.* II.] upon a precedent in the *Exchequer*, that great and ſmall tithes depended not on the value of the quantity, but on the * nature of the thing; and therefore though the whole farm is turned into ſmall tithes, it will be ſtill ſmall. Hay is a great tithe; there has been a modern culture, which makes that hay which was not ſo formerly, as foreign graſs, lucern, *&c.* a *modus* for tithe hay covers it, becauſe it is the ſame ſort of thing now. A great difference has been made in ſmall tithes with regard to culture, being formerly only uſed in gardens; yet if there is a *modus* for all ſmall tithes, the preſcription cannot be thereby overturned. A *modus* is applicable to whatever ſmall tithes ſhall produce, as well as others; tho' you cannot preſcribe in lieu of hops particularly, hops will paſs under a grant *de minutis decimis*. An ancient grant of all ſmall tithes would now carry

* See the note to the above caſe of *Smith* and *Wyatt*, *ante*, p. 395, 396.

any

cially in cases of very extensive consequences, lightly to overturn and overthrow customary payments, that have prevailed for a great tract of years, which is commonly called time out of mind, or memory of man, though I do not mean strictly according to the notion of law before the time of the transportation of King *Richard* the *First*. I take it, that the question before the court in this case is of very extensive consequence, through a great tract of country. It appears in this case, and in former cases in *Westminster-Hall*, that it extends and runs through several parishes in this country. When therefore that is the case, and no instance or tradition of payment of tithe in kind in this parish for a great tract of years, purchasers have come in, and paid a price for the land according to those customary payments; and it would vary and alter the value of their property to overturn or overthrow them, which is a reason why these objections to them should be very well weighed and considered, and that they should not be too lightly overturned, as has been done in some instances.

Rector of common right intitled to tithe in kind.

The plaintiff, upon this general right as rector, is certainly intitled to his demand of tithes in kind of these lands, if no bar is shewn; the defence insisted upon, is a *modus*; and undoubtedly, as against the right of rector, it is incumbent on the defendant to maintain that *modus* in point of law and fact.

There are two general objections against allowing this *modus*, which are insisted upon as sufficient to over-rule it now; first, that it is not sufficiently proved in point of fact; the other, that if it was so, yet that it is not good in point of law; which objection, in point of law, divides itself into two objections: The first a general one, that the affirmative part

part of the *modus*, the payment of nine-pence an acre, cannot have ſubſiſted time out of mind; of which the court is bound to take notice; and that it cannot have ſubſiſted time out of mind, from the alteration of the value of money, becauſe nine-pence an acre muſt be much above the value of the tithe of this land at the time this *modus* or compoſition muſt be ſuppoſed to commence; which the laws of *England* by a pretty extraordinary law (and which I believe no other country does) makes from the tranſportation of *Richard* the *Firſt* to the Holy Land: The other is an objection tending to the ſame thing, that this *modus* cannot have ſubſiſted time out of mind, becauſe there is an exemption of a product and culture, which was not made, and could not be uſed at the time it was ſuppoſed to commence; and that this exemption, being part of the agreement, muſt be coeval with the agreement itſelf, which ſhews it could not be an agreement time out of mind.

Limitation of time from tranſportation of *Rich.* I. to the Holy Land.

Firſt, As to the proof of the *modus* in point of fact, as to which many obſervations are made on the part of the plaintiffs; and certainly, in caſes of this kind, theſe obſervations have been frequently made, and have juſtly had weight; that there is a great variation in the proof; that none of the recepts call it a *modus*; only two of the witneſſes call it ſo; the others ſay, there have been ſuch payments for tithes generally; and one calls it a compoſition; and Lord *Talbot* has ſaid, he would not call it a *modus*, if no witneſſes would; if not one, that might be a material obſervation; but that, I am of opinion, is too ſlight an obſervation in general, that becauſe theſe witneſſes (who are lay gens) do not make uſe of a legal technical word, that cuſtomary payment ſhall be over-ruled; the queſtion is upon the fact; the law makes

makes the inference; next, that the receipts do not call it a *modus*; and that they are very nice in taking receipts. Very often miniſters will not call it a *modus* in the receipt, becauſe they will not prejudice their ſucceſſors, though they will give a receipt for the ſame, as uſual; in very few inſtances will the rector ſubmit to call it a *modus* in the receipt; and if he will not, the pariſhioners cannot compel him, but muſt ſubmit, or elſe pay without a receipt. And that ſort of evidence is in ſome meaſure ſtrengthened by a letter of the plaintiff's, in which he does not (and very rightly) call it a *modus*, but inſiſts on this payment as the payment uſually made for this land formerly, and upon an account and payment to be made upon that foot as the right he inſiſted upon; whereas he might have demanded an account and ſatisfaction for tithe in kind, if this was not a compoſition or *modus* that bound him. But as to all theſe obſervations, I ſhould lay much more ſtreſs on them, if there was any evidence for the plaintiff, either of actual payment of tithe in kind, or of a tradition thereof for this marſh land, of which there is none, either of the fact of payment of tithe in kind, or any tradition from any ancient perſons; which is proper evidence in caſes of cuſtom and uſage. Then the poſitive proof on one ſide is ſtrengthned by the weakneſs or want of poſitive proof (which implies a negative) on the other ſide. It is determining caſes not on the merits, but according to the critical penning of depoſitions. The want of any evidence not only of payment of tithe in kind, but of any tradition, takes off the weight of the obſervation, that this might have commenced within a ſhort ſpace of time; for then ſome tradition would have been ſhewn that tithe in kind had been ever paid, or even inſiſted upon or demanded; but there is none. If therefore

therefore it reſted on the proof, it is impoſſible to ſay, that a decree muſt be made for payment of tithe in kind, which as at preſent I cannot allow.

But the moſt ſtrong objections are thoſe, in point of law, ariſing from facts; but ſuch facts as, it is inſiſted upon, the court is bound to take notice of; firſt, as to exemption of hops, which has ſomething material in it; for hops are always allowed to have been introduced in modern times, that is modern in reſpect of long antiquity; they began to be uſed and propagated in Queen *Elizabeth*'s time, and exiſted in this kingdom in *Philip* and *Mary*'s time, and before; as appears from the ſtatutes in the reign of *Henry* the *Eighth*, therefore they were here: but here, as tobacco is here; planted for curioſity, and in ſmall quantities: but they were in this kingdom to a certain degree before *Elizabeth*'s time, though *non conſtat* how far. Is it poſſible there ſhould be ſuch an exemption in the beginning, or does the making this exemption overturn the affirmative part of the *modus*? ſuppoſe the agreement was to pay ninepence an acre for all ſmall tithes of this land, except ſuch ſmall tithes as ſhall be afterward introduced; that would be certainly a good agreement. Then, inſtead of laying it in thoſe general words, they have ſpecified it with ſuch a ſort of product as theſe lands probably will be tithed with; but it is too much to lay ſuch weight on this objection as to overturn this *modus*, when I ſee what has already paſſed. I allow that caſe of *Bate* in the *Exchequer*, not to be ſuch an authority as to bind in the preſent caſe; and it ſeems as odd a proceeding as I ever ſaw in a court of equity. Iſſues were firſt directed on both bills; and afterwards the trial was ſo had as not to determine the merits of the caſe, which the court expects after a trial, but

Hops began in *Elizabeth*'s time to be propagated; but exiſted before in ſmall quantities.

plaintiff has conſidered it as ſuch, and has entered into proof of the fact, that is by records, to ſhew the value of land in the time of *Henry* the *Eighth*. I cannot make a certain inference from thence. It is a material evidence to be ſure; and more light might have been had in that caſe of *Wareborn*, if Juſtice *Eyre* had let that in. But when ſuch commiſſioners are ever employed to make this valuation, I believe this valuation is never carried to the height; and that in the time of *Henry* the *Eighth* has been always thought not to be carried to the height; compare it with valuation of modern times, as on the augmentation of the Queen's bounty not valued at a third part: and yet I believe, they did not go ſtricter than in that of *Henry* the *Eighth*. I uſe this in this manner not to throw it off, only to ſhew this is not concluſive evidence. Then the queſtion is, whether it is not fit for me to do, as the court of of *Exchequer* did, in the caſe of *Wareborn* to direct an iſſue, and in that reſpect an inquiry to be made into that caſe of the rector of *Stoke*, which was firſt in the *Exchequer*, where *Giffard* brought his bill for tithe in kind, and particularly for tithe of lambs: the defendant there inſiſted, that neither he nor his predeceſſors were intitled to receive that, becauſe of an ancient uſage or cuſtom in that pariſh, that every occupier having land paid three-pence, and no more, as a *modus*, in full ſatisfaction of the tithe of ſuch lambs. The court did not determine it on the hearing, but directed a trial: but the plaintiff did not proceed to trial, and the court ordered the iſſue to be taken *pro confeſſo*, and afterwards ordered his bill to be diſmiſſed. From that he appealed; and the reaſon given for his appeal (as appears from the ſame) was that the court ought not to have directed an iſſue but ſhould have over-ruled this *modus* as too rank, becauſe

becauſe of the ancient price of cattle and other commodities, ſo that a lamb would not be worth formerly more than ſix-pence: and that it was proved to be only a modern compoſition; the anſwer given to that is, that the ground for that objection ſeemed to be, that the *modus* was ſo great, and ſo near the value of titheable matters for which paid, that it muſt be a modern compoſition, conſidering the decreaſe of the value of coin: but that this objection, ariſing on matter of fact, was very proper to be conſidered by a jury. It was heard in 1735, at which I was not preſent, being then in the *King's Bench*. The Lords affirmed the decree, and therefore affirmed, that ſending it to an iſſue was proper and right. I ſent to Mr. *Philip Ward*, ſon of Lord Chief Baron *Ward* (and who has a very good repertory of caſes in the *Exchequer*) to know what caſes upon this head had been in the *Exchequer*; and the caſe of *Layfield* againſt *Delap* was ſent to me; and alſo another, which comes up to the preſent, very like it, and in the ſame country, of *Graſcomb* againſt *Jefferies*, 17th *November*, 1687, which is before any of the caſes that have been cited upon this head, and the account of it is this: It begins with ſaying, This is a *Kentiſh* cauſe, and the plaintiff demanded tithe in kind for marſh-land, the defendant alledged a *modus* or cuſtom time out of mind, to pay twelve pence *per* acre for all marſh-land within the pariſh, in lieu of all tithes; proof was made of this payment for forty or fifty years; and upon this, and as there was no proof of payment of tithe in kind, a trial was prayed to be directed; but the court denied the trial, and declared the pretended *modus* or cuſtom to be void, as it was proved, the marſh-land was rented at ſo much an acre, that it was not poſſible, nor could a reaſonable intendment be made, that the *modus* or cuſtom, time out of mind, could be, and therefore

Graſcomb and *Jefferies*.

the court over-ruled the *modus*, and ſaid, that the court uſually over-ruled a *modus* which ſeemed too great, and which did not ſeem reaſonable to the value. But *nota*, (and for this I cited it) this cauſe was reheard, upon the defendant's motion, and the *modus* was ſent to trial at law, by a *Middleſex* jury; but it does not appear what was done afterwards. The uſe I make of this caſe is to ſhew, that the taking this ſort of objection, founded on the height of the ſum, to be a matter of fact in ſome caſes for the conſideration of a jury, is not a new invention, nor firſt introduced in that caſe of *Giffard*, or that of *Bate*, but was done by the court in 1687, on great conſideration; for it was twice before them: on the firſt hearing they were of a contrary opinion, and over-ruled the *modus*, upon the arguing it; but upon rehearing, and reconſidering, they reverſed their own decree, and directed a trial. And I am of opinion, that in theſe kind of caſes it is very fit to do ſo, and more ſo, in a caſe where it concerns the height of a *modus*, in reſpect of the value of land, than any other, eſpecially of land which has been greatly improving and improved for ſeveral years. *Romney-marſh* is the firſt level, which was banked in from the ſea; and the laws of the ſewers, and more modern laws, have a reference to that of *Romney*, and make that the rule: there is a poſſibility, where land was of little value at the time, but improving and incloſing, the parſon, patron, and ordinary might come to an agreement to give from that time much more than the tithe was, in order to prevent the parſon's demanding tithe in kind afterward, when the land was greatly improved at their expence. It is like the caſe, where a commonage is incloſed at a great expence, and much more is by agreement given to the parſon, than his tithe in kind at the preſent,

preſent, becauſe it is to prevent his receiving tithe according to the improved value.

Therefore I will direct it to be tried; but the queſtion is, where it is to be tried? According to *Graſcomb* againſt *Jefferes*, it is proper to try it in *London* or *Middleſex*. *Romney-marſh* is very extenſive, and hardly any gentleman in *Kent*, who has not an eſtate there; which I preſume, was the reaſon of directing it in that manner in that caſe. If I had not found this precedent, I probably ſhould not have thought ſo ill of my countrymen as to do it; let it be tried in *London* upon an iſſue, whether the occupiers of the marſh-land in this pariſh have paid, *&c.* juſt as it is laid in the anſwer: but the defendant in this court muſt be plaintiff at law, becauſe the iſſue is upon him.

In *Chancery*.

The Attorney-general

againſt

Bowles, and others.

LORD Chancellor *Hardwicke* ſaid, that in the diſtinction which has been made between *real compoſitions* and *moduſes*, *real compoſition* does not mean any ſubſtantial, permanent ſecurity for the payment of the compoſition, but land ſubſtituted in lieu of tithes.

Real compoſition does not mean a ſecurity for payment of compoſition, but land ſubſtituted in lieu of tithes. 3 *Tr. Atk* Rep. 806. pl. 297. *Id.* 809.

Michaelmas Term, 1 Geo. III.

A. D. 1760.

In *Chancery*.

Sims againſt *Barnett*.

The difference between a great and ſmall tithe, depends entirely upon the * nature of the thing from which it ariſes.

A Bill was brought for the tithes of peas and beans grown in fields, gathered by hand while green, and ſold in markets.

5 *Bac.* Abr. 70. pl. 19. * See *ante* 397. n.

It was ſaid for the plaintiff, that, although the tithes of the peaſe and beans would, if they had ſtood till they were ripe, have been great tithes, by gathering the peaſe and beans before they were ripe, and by hand, they became ſmall tithes.

The decree was, that the tithe was a great tithe.

And by Lord *Henley*, Keeper.

The difference between a great and a ſmall tithe, depends intirely upon the nature of the thing, from which it ariſes; it would be ſtrange to hold, that the gathering of a thing at one time, ſhould make the tithe thereof a ſmall tithe, which would, if the thing had been gathered at another time, have been a great tithe: it has been expreſsly determined, that the tithe of tares, whether cut green or ripe, is a great tithe; and it has been holden, that the mode of cultivating land for the growing of peas or beans, did not make the tithe thereof a ſmall tithe; and there is ſurely leſs reaſon to hold, that the mode of gathering peas or beans, ſhould make the tithe thereof a ſmall tithe.

See the caſes of *Hodgſon* againſt *Smith*, under *Trinity* Term, 2 *Geo.* I. *Gumley* againſt *Burt*, under *Trinity* Term, 2 *Geo.* I.

In

The ſame caſe in this court as ſtated by Doctor BURN.

Sims, vicar of *Eaſtham* in *Eſſex*, againſt *Bennet* and *Johnſon*, occupiers of lands within the ſaid pariſh, and *Wilkes* and *Hitch*, impropriators of the rectory of the ſaid pariſh.

MR. *Sims* the vicar brought his bill in *Chancery*, in the year 1756, ſetting forth, that by the endowment of the vicarage he is intitled to the tithes of gardens and curtilages, and all ſorts of tithes, except the tithes of ſheaves, and hay, and mills, [*præter decimas garbarum et fœni et molendinorum ad ventum*] that the defendants *Bennet* and *Johnſon* holding ſeveral parcels of land in the ſaid pariſh, did in the ſame year cultivate ſeveral pieces of ſuch land with beans and peaſe, and ſuch ſort as are generally uſed for the food of man, which they gathered in the months of *June*, *July*, and *Auguſt*, by the hand in the field, by plucking them from the ſtalk while green, and ſent the ſame to market, and ſold them for the food of man accordingly; and inſiſting, that by the gathering beans and peas by the hand, ſo cultivated as aforeſaid, he the ſaid *Sims*, as vicar, by virtue of the ſaid endowment, became intitled to the tithe thereof, and that no tithe ought to be paid for the ſame to the impropriator, nor ought beans and peaſe ſo cultivated and gathered by the hand, by plucking them from the ſtalk while green, to be conſidered as part of the tithes appropriated to the rectory: to this bill the defendants put in their anſwers; and the defendant *Bennet* ſaid, that in the year 1756 he ſowed thirty acres or thereabouts with peaſe and beans, in the open fields in the ſaid pariſh, and believed that in *June*, *July*, and *Auguſt*, in the ſame year he gather-

3 *Burn's* Eccleſ. Law, 423.

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ed ten acres and an half or thereabouts of the ſame by the hand in the field, by plucking them from the ſtalk, while they were green, and ſold them in a cart by retail by pecks and ſmaller quantities, in and about the pariſh of *Eaſtham*, and in the ſtreets of *London*, and the remainder of ſuch beans and peaſe were gathered into the barn and threſhed; and the defendant *Johnſon* ſaid, that he ſowed five acres of beans and peaſe in like manner, and part thereof he plucked by the hand when green, and ſold the ſame in *London* ſtreets and at market, and gathered and threſhed the remainder in the barn; and both the defendants ſaid, that all their ground in the ſaid pariſh, ſowed with beans and peaſe in the ſaid year, was ploughed for that purpoſe, and no part thereof was dug with a ſpade, except under or near the hedges, where the ſame could not be ploughed, or in ſuch places as were too wet to be ploughed; and that the tithe of all beans and peaſe, whether gathered green or otherwiſe, having been always paid to the rector, and eſteemed to belong to him, they had therefore compounded with the impropriator for the ſame, and hoped they ſhould not be compelled to account alſo with the vicar for the ſame tithes.

The defendants *Wilkes* and *Hitch*, in their anſwer, inſiſted on their right as impropriators; witneſſes were examined on both ſides, ſeveral of whom depoſed, that ſuch peaſe and beans as are uſed for the food of man had been cultivated in the fields and grounds of the pariſh of *Eaſtham*, only for about thirty years paſt, and were cultivated and gathered green off the ſtem, as uſually done in a garden (ſave only that in the field the plough has been generally uſed and in the garden the ſpade) and in rows, but in a different manner from thoſe planted and ſowen

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in fields in the common courſe of huſbandry, for provender, and not for man's food; and one of the witneſſes, Mr. *Wyat*, vicar of the pariſh of *Weſtham* (adjoining to that of *Eaſtham*) ſaid, that in the year 1753 he commenced a ſuit in *Chancery* againſt the impropriator and others of his ſaid pariſh for ſuch tithes, and that the then Lord Chancellor decreed in his favour, and he hath enjoyed the tithes ever ſince.

On hearing, the Lord Keeper *Henley* decreed, *November* 10, 1760, that the vicar's bill ſhould be diſmiſſed with coſts.

See this caſe on appeal, under *Michaelmas* Term, 3 *Geo.* III.

In *Chancery*.

Joſeph Sims, Clerk, — Plaintiff.

Thomas Bennett, *William Johnſon*, *Frances Wilkes*, widow, and *Charles Hitch* — Defendants.

*** *The plaintiff's caſe as ſtated by his own pleadings, extracted from the printed caſes of appeal, delivered to the lords, counſel, and parties concerned, previous to the hearing, with the manuſcript judgments of the houſe indorſed thereon.*

Appropriation of *Eaſtham*.

THE pariſh church of St. *Mary Magdalen*, in *Eaſtham* in the county of *Eſſex* before the year 1309, was a rectory of the patronage of the abbot and convent of *Stratford Langthorne* in the ſaid county, but in that year the ſaid abbot and convent having made complaints to *Ralph de Baldock*, then Lord Biſhop of *London*, of their great loſſes, by the inundations

tions of their lands, and of other their diſtrieſſes, the ſaid lord Biſhop, with the approbation of the chapter of the cathedral church of his ſee, did by indenture dated in *April*, in the ſaid year 1309, duly executed, appropriate the ſaid rectory to the uſe of the ſaid abbot and convent, reſerving to himſelf the ſaid *Ralph de Baldock*, and his ſucceſſors in the ſee of *London*, the preſentation to the vicarage; and after directing by way of endowment, that the vicar of the ſaid church for the time being, ſhould have and enjoy the uſual and cuſtomary place of abode, the fees of offerings, tithes of gardens, curtilages and other things, he further grants unto the vicar in theſe words, * "*Ac omnimodas decimas, præter decimas garbarum, et fœni, et molendini ad ventum*;" and then directs that the abbot and convent, and their ſucceſſors, ſhould, out of the tithes appropriated to them, pay to the vicar a yearly penſion of five marks.

Endowment of vicar.

Grant of the rectory from the crown.

That in the reign of king *Henry* the *Eighth*, upon the diſſolution of monaſteries, the poſſeſſions of the abbey of *Stratford Langthorne*, veſted in the crown; and by letters patent of the 10th of *May*, in the twenty-ſixth year of his reign, the ſaid king granted unto *Richard Breme*, Eſq; and his heirs for ever, the ſaid rectory and pariſh church of *Eaſtham*, with all rights, members and appurtenants, in the ſaid county of *Eſſex*, then late belonging to the ſaid monaſtery of *Stratford Langthorne*, then diſſolved; to hold the ſame to him, his heirs and aſſigns for ever, in as ample manner as the laſt abbot of the ſaid late monaſtery or any of his predeceſſors before the diſſolution thereof held and enjoyed the ſame.

* *And all manner of tithes, except the tithes of grain and of hay, and of wind-mills, &c.*

That

That no reſervation being made in the ſaid letters patent, of the ſaid five marks *per ann.* which ought to have been paid to the vicar, out of the appropriated tithes; the ſaid *Richard Breme* refuſed to pay the ſame; whereupon it was claimed, and hath ever ſince been paid out of the King's *Exchequer.*

That in *January*, 1756, the plaintiff was, by the then Lord Biſhop of *London*, collated to the vicarage, and to the pariſh and pariſh-church of St. *Mary Magdalen* in *Eaſtham* aforeſaid, and was ſoon afterwards inducted thereto; and thereby, and by virtue of the ſaid endowment, became intitled to all manner of tithes yearly growing, ariſing, and renewing, within the ſaid pariſh (* *præter decimas garbarum, & fœni, molendini ad ventum*, then ariſing, or being within the ſaid pariſh).

Plaintiff collated and inducted to *Eaſtham* vicarage.

The defendants *Bennet* and *Johnſon*, holding ſeveral parcels of land in the ſaid pariſh, in the ſaid year 1756, ſeverally cultivated ſeveral pieces of ſuch land with beans and peaſe, of ſuch ſort as are generally uſed for the food of man, which they gathered in the months of *June*, *July*, and *Auguſt*, by the hand in the fields, by plucking them from the ſtalk whilſt green, and ſent the ſame to market, and ſold them for the food of man accordingly.

Lands cultivated with peaſe and beans.

That the ſaid *Bennet* and *Johnſon* refuſing or neglecting to pay the tithes of ſuch peaſe and beans to the plaintiff, and the tithes appropriated of the ſaid pariſh being veſted in the defendant *Frances Wilkes*, then the wife, and now the widow, of *Richard Wilkes*, doctor in phyſick, for her life, with the

* *Except the tithes of grain and of hay, and of wind-mills, &c.*

reverſion

reverſion in fee to the defendant *Charles Hitch*, and his heirs; the plaintiff in *Michaelmas* Term, 1756, exhibited his bill in the court of *Chancery* againſt the defendants, and the ſaid *Richard Wilkes*, ſtating the ſeveral matters aforeſaid, and inſiſting that by the gathering beans and peaſe by the hand, ſo cultivated as aforeſaid, the plaintiff as the vicar, by virtue of ſuch endowment, became intitled to the tithe thereof, and that no tithe ought to be paid for the ſame to the impropriator, nor ought beans and peaſe ſo cultivated and gathered by the hand, by plucking from the ſtalk when green, to be conſidered as part of the tithe ſo appropriated, and therefore prayed that the defendants might anſwer the premiſes, and that the defendants *Bennet* and *Johnſon* might account with the plaintiff, and make him ſatisfaction for ſaid tithe of beans and peaſe ſo gathered as aforeſaid, ſince the ſaid plaintiff was collated and inducted into the ſaid vicarage, and that the plaintiff's right as vicar, to the tithe of ſuch beans and peaſe, might be eſtabliſhed for the benefit of the plaintiff, and the vicar of the ſaid pariſh for the time being.

Bill *Michaelmas* Term, 1756.

Anſwer of the farmers *Bennet* and *Johnſon*.

To this bill, which was afterwards amended, the defendants put in their ſeveral anſwers, and the defendants *Bennet* and *Johnſon*, the farmers, admitted their being in poſſeſſion of lands in the pariſh. And that in 1756 *Bennet* planted and ſowed thirteen acres of the ſaid lands, and *Johnſon* five acres, with peaſe and beans, part whereof were of the kind generally uſed for the food of man, and were moſtly ſo uſed in an open field in the pariſh, and that in *June*, *July*, and *Auguſt*, they gathered a great part thereof by the hand, by plucking them off the ſtalk whilſt green, and ſold them about the ſtreets of the pariſh, and in the ſtreets of *London*, by the peck, or

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in ſmaller quantities, and in ſacks at market, and what were not ſo plucked, were left to ripen, and gathered into barns, and afterward threſhed and given to the hogs; and ſay they plowed the ground, and did not dig the ſame with ſpades, except under or near the hedges, and that they paid tithes for the ſame to the agents of the defendants *Wilkes* and his wife, and admit that the plaintiff demanded of them the tithe, which they refuſed to pay.

Anſwer of *Wilkes* and his wife, and of *Hitch*.

The defendants *Wilkes* and his wife, in their anſwer, ſet out their title, for the life of the ſaid *Frances*, to the tithes appropriated in the ſaid pariſh; and the ſaid *Charles Hitch*, in his anſwer, ſets out his title to the reverſion in fee of the ſame, and admits that *Bennet* and *Johnſon*, in 1756, planted and ſowed ſeveral acres of peaſe and beans in the ſaid pariſh, and cultivated the ſame by the plough, as wheat and other grain is cultivated, and not with the ſpade in a garden-like manner; and that ſome or part thereof was gathered into barns as other grain, and other part thereof plucked green from the ſtalk; and inſiſted that ſuch peaſe and beans, whether the ſame were then ripe, gathered into barns, or pluckt by the hand from the ſtalk whilſt green, and ſold for man's food, were to be conſidered as great tithes, and belonging to the impropriator, and not as ſmall tithes, and belonging to the vicar; and that though the beans and peaſe in queſtion might be of ſuch ſort as are moſtly gathered green for the food of man, and planted and ſowed, and ſold by the defendants *Bennet* and *Johnſon* for that purpoſe, yet they inſiſted, that as the ſame was cultivated by the plough, and ſowed and gathered in the common titheable fields within the pariſh, that the tithes thereof were great tithes, and, as ſuch, belonged to the

the impropriator, and that the quality of the ſaid peaſe and beans, and the manner of gathering them, did in no reſpect alter the property of the tithes; and that the exception in the above endowment, could not be confined to the tithes of ſuch corn and grain, as when ripe was reaped or mowed, but extended to all corn and grain whatſoever, uncultivated by the plough in the fields, and not by the ſpade, whether ſuffered to ripen or not; and that the beans and peaſe ſo cultivated, and gathered whilſt green by the hand, and ſold at market, as well as thoſe gathered into barns when ripe, ought to pay tithes to the impropriator.

To which anſwers the plaintiff replied, and the cauſe being at iſſue, ſeveral witneſſes were examined on both ſides.

Plaintiff's witneſſes.

Moſt of the plaintiff's witneſſes prove that ſuch peaſe and beans as are uſed for the food of man, have been cultivated in fields and grounds of the pariſh of *Eaſtham*, only for thirty years, or thereabouts at the utmoſt, and have been cultivated and gathered green off the ſtem, as uſually done in a garden (ſave only that in the field the plough hath been generally uſed, and in the garden the ſpade) and in rows, but in a different manner from thoſe planted and ſowed in fields, in the common courſe of huſbandry for provender, and not for man's food.

The Reverend Mr. *Keightey*, the vicar of *Low Layton*, a neighbouring pariſh to *Eaſtham*, proved that ſince he had been vicar there, which was five years, he had been paid tithes for peaſe and beans, as before deſcribed to have grown, and been raiſed in the open fields, and believes, his two immediate predeceſſors

deceſſors for eight years back received the ſaid tithe, and that *Stephen Wood*, who was pariſh clerk, when the witneſs came there, had collected the ſame, amongſt other vicarial tithes, for forty years before.

The Reverend Mr. *Hugh Wyat* ſays the ſame with reſpect to the pariſh of *Weſtham*, of which he is vicar, and moreover, that he commenced a ſuit in the High Court of *Chancery*, againſt the impropriator and others of the ſaid pariſh (which adjoins to that of *Eaſtham*) for ſuch tithes, and that in 1753, the then Lord Chancellor decreed in his favour, ſince which he hath received the tithes of peaſe and beans, under the before deſcription, without any interruption.

Thomas Welch, who was a farmer in *Eaſtham* about twenty years ago, and *Thomas Howard* about eight years ago, ſay, they never paid any tithes for peaſe grown and gathered green for man's food, either to the impropriator or vicar; and that they paid their tithes in kind, after cut and ſevered from the ground, to the impropriator, of wheat, barley, oats, rye, peaſe, and beans, when left to ripen.

Thomas Lovett, aged ſixty-ſix, ſaith, he hath lived in the pariſh from his youth, and that Mr. *Deberde*, and Mr. *Vade*, preceding vicars, claimed theſe tithes, and ſome paid, and others not; and ſaith, that formerly the tithes of the pariſh were taken in kind, till about fourteen or fifteen years ſince. Defendant *Wilkes* came to a compoſition with the farmers, to take three ſhillings and ſix-pence an acre for all their lands, and to indemnify them from all demands of any other perſons, and that before the compoſition, no tithes were taken in general for green peaſe and

beans for man's food; but ſince the culture thereof, hath very much increaſed.

Defendant's witneſſes.

None of the witneſſes for the defendants ſwear poſitively to the payment of tithes of peas and beans gathered green for the food of man, except *Nathaniel Bayes* and *Ellet Cater*, the former of whom carries the payment back ſeventeen or eighteen years; and *Ellet Cater* ſwears, that for twenty years, then laſt, and upwards, he was employed by *Heigham Bendiſh*, the ſon of the then impropriator of the pariſh, to collect the great tithes of the ſaid pariſh, and that he took of the inhabitants three ſhillings and and ſix-pence an acre for the tithe of peas and beans, when gathered green for the food of man. But this is not true, for Mrs. *Audery Bendiſh*, who this witneſs ſwears was impropriatrix for her life, had not been then dead eighteen years before that time, as appears by the regiſter, and of conſequence, twenty years ago, ſhe herſelf muſt have received tithes of peas and beans gathered green, if any ſuch tithes were then paid either in kind, or by compoſition, and not this witneſs, who never pretended to be employed by her for that purpoſe.

A great number of witneſſes were examined by the defendants, to prove that in ſeveral pariſhes the tithes of peas and beans, gathered green, were paid to the impropriator, and not to the vicars; but it is preſumed, the incapacity of the vicars to aſſert their rights, or their having no endowments to ſupport their claims, are the principal reaſons thereof.

This cauſe coming on to be heard on the 22d and 23d days of *February*, 1760, before the Right Honourable the Lord Keeper of the Great Seal of

Great Britain, his lordſhip on the 10th day of *November*, 1760, by his decree, was pleaſed to diſmiſs the bill of the plaintiff without coſts.

10th *November*, 1760, Decree of diſmiſſion.

Joſeph Smith, Clerk, Vicar of the Pariſh and Pariſh Church of St. *Mary Magdalen*, in *Eaſtham*, in the County of *Eſſex*, } Plaintiff.

Thomas Bennet, and *William Johnſon*, Occupiers of Lands within the ſaid Pariſh, and *Frances Wilkes*, Widow of Dr. *Richard Wilkes*, lately deceaſed, and *Charles Hitch*, Eſq; Impropriator of the ſaid Rectory of the ſaid Pariſh of *Eaſtham*, } Defendants.

The defendant's caſe, as ſtated by his own pleadings, extracted from the printed caſes of appeal, delivered to the Lords, counſel, and parties concerned, previous to the hearing, with the manuſcript judgments of the Houſe endorſed thereon.

THAT in the year 1309, the abbot and convent of *Stratford Langthorn*, in the county of *Eſſex*, having complained to *Ralph de Baldock*, then Lord Biſhop of *London*, of their great loſſes by inundations of their lands, and other diſtreſſes, the ſaid Lord Biſhop, by an inſtrument of appropriation, bearing date the *9th day of April*, in the ſaid year 1309, after obſerving, that the revenues of the ſaid monaſtery were greatly reduced by the accidents, and other means mentioned in the ſaid inſtrument, did, for

9th *April*, 1309, Lord Biſhop of *London*'s inſtrument of appropriation recited.

for the relief of their diſtreſſes, by the advice and with the conſent of his chapter, and by virtue of his pontifical authority, give, grant, and appropriate, to the ſaid abbot and convent, the pariſh church of *Eaſtham*, to the uſe of the monaſtery for ever, ſaving thereout a convenient portion for the ſupport of a perpetual vicar in the ſame church: and therefore he ordained, that the vicar ſhould have a manſion-houſe, and ſhould have and take the tithes of gardens and curtilages, and all ſorts of tithes, *præter decimas garbarum & fœni molendini ad ventum*, and that he ſhould have all oblations, legacies, mortuaries, and alterage; and that he alſo ſhould receive from the abbot and convent five marks ſterling yearly, *de prædict' decimis garbarum*, in augmentation of his aforeſaid portion, reſerving the collation to the vicarage to the Biſhop and his ſucceſſors; which inſtrument of endowment is to the following effect:

"*Ralph, &c.* To the religious men, the abbot and convent of *Stratford*, greeting: To ſalute you hereby, we hold not only propagating the ſacred religion to be an act of piety, and acceptable to God, but alſo the maintaining it by all poſſible means. Conſidering that you and your monaſtery have often been deſtroyed, by evident and frequent inundations of water, and the fruits and cattle of your lands, meadows, and paſtures, have thereby periſhed; and alſo the charge, by the concourſe of people flocking to you and your houſe for hoſpitality; beſides contributions, and other many and unuſual burthens, you are become depreſſed with ſo much poverty, that, without great aſſiſtance, the incurred expences cannot be reimburſed, nor you properly ſupplied with the neceſſaries of life, from the revenues of your monaſtery, for the preſervation of religion. We, deſirous of aſſiſting your neceſſities by all the means

means in our power, on this occaſion, do give and grant the pariſh of *Eaſtham*, in our diocefe, and contiguous to your monaſtery, whoſe true patrons you are, and to which you have preſented divers rectors in the very laſt vacancies, towards the relief of the ſaid burthen and diſburſements, to the ſupport of your religion, and increaſe of good works, and all its appurtenances, in the exerciſe of due diligence; and we do appropriate the ſame to your own uſe, by the advice and aſſent of the chapter of our church, and by virtue of pontifical authority, in tenor of theſe preſents, out of charity, to hold for ever, reſerving thereout a rateable portion towards the maintainance of a vicar for ever, to officiate in the ſame church, which we have thought proper thus to ordain and incumber.

Firſt, We order, that the vicar for the time being have an houſe, as they were uſed to have in former times, and that ſuch vicar have and receive *tithes of gardens and curtilages, and all ſorts of tithes, except tithes of grain, of hay, and of wind-mills. Item*, That they have *all manner of offerings, revenues, and legacies whatſoever, left to the ſaid church, or in reſpect thereof, and all other things brought with the bodies of the defunct*, which of right or by cuſtom belong to the church, and *all other matters that are acknowledged to appertain to the altar*; and we moreover direct, that the ſame vicar ſhall yearly have and receive, *from the abbot and convent*, on the feaſts of Saint *Michael* and *Eaſter*, by equal portions, *five marks of lawful ſterling money, from the ſaid tithes of grain*, to be duly paid by you to him, in augmentation of the portion aforeſaid; but the vicarage we have reſerved to ourſelves, and our ſucceſſors, biſhops of *London*, and decreed and ordained the collation, as often as the ſaid

church ſhall become vacant, to belong to the chapter, during the vacancy of the ſee of *London*, ſaving to ourſelves, and our ſucceſſors, in the ſame pariſh church, lawful epiſcopal juriſdiction, and all other rights, due to us as well as to others by law or cuſtom, and reſerving upon all occaſions the dignity of our cathedral church.

The ſaid vicar is to bear all common burthens, except the repair or rebuilding of the church; but the abbot and his ſucceſſors, who ſhall be as rectors for the time of the aforeſaid pariſh church of *Eaſtham*, ſhall, in the name of the ſaid church, pay canonical obedience, reſpect, and honour to us, and to our ſucceſſors and other ordinaries, as rectors of the churches within our dioceſes. In teſtimony whereof, to this written indenture *tripartite*, ſeals are affixed, *viz.* our ſeal to the part remaining with the ſaid abbot and convent, the ſeal uſed by the ſaid abbot and convent to the part remaining with us, and our ſeal as well as that of the ſaid religious men, to that part remaining with the chapter. Dated at *London*, 9*th April*, A. D. 1309."

Copy of the original.

Appropriatio Eccleſiæ de Eaſtham.

The inſtrument ſet forth in *hæc verba*.

"*RANDOLPHUS*, &c. *religioſis viris abbati & conventui monaſterii de* Stratford, *ſalutem: In verè ſalutare pium, et Deo gratum eſtimamus, nedum ſacram religionem plantare verum et plantatam modis omnibus confovere; attendentes quod vos veſtrumq; monaſterium maniſeſtis & crebris aquarum inundationibus per quas terrarum pratorum et paſcuorum veſtrorum fructus ac animalia veſtra frequenter perierunt; ac etiam onere, ad vos domumq; veſtram, ſub hoſpitalitatis colore, confluentium, nec non et contributionibus, ac aliis variis plus ſolito gra-*

vaminibus,

vaminibus, tantâ deprimi indigentiâ, quod ſine magno ſuffragio, nequeunt illata diſpendia reperari, nec vobis de monaſterii veſtri proventibus, pro religionis conſervatione, vitæ neceſſaria, prout convenit miniſtrari.—Nos veſtris neceſſitatibus curâ, quâ poſſumus, in hâc parte ſubvenire volentes, eccleſiam parochialem de Eaſtham *noſtræ dioceſis, veſtro vicinam monaſterio, cujus veri eſtis patroni, ad quam diverſos rectores, in ultimis ipſis vacationibus, preſentaſtis, in dictorum onerum et gravaminum relevationem; ad veſtræ religionis ſuſtentationem, et operum meritoriorum augmentationem, ac omnibus ſuis pertinentibus perhabito tractatu diligenti, qui in hâc parte requiritur, de conſilio et aſſenſu capituli noſtræ eccleſiæ vobis donamus, concedimus, & authoritate pontificali, tenore preſentium, caritatis intuitu; appropriamus in uſus proprios, in perpetuum poſſidendum; ſalvâ inde congruâ portione ad ſuſtentationem perpetui vicarii, in eadem eccleſiâ miniſtraturi, quam ſic ordinare duximus et taxare. Imprimis, videlicet, ordinamus, quod vicarius, qui pro tempore erit, ibidem manſum habeat, quem cæteri vicarii, ultimis retroactis temporibus, habere conſueverunt. Et quod idem vicarius habeat, et percipiat* decimas hortorum, et curtilageorum et omnimodas decimas, præter decimas garbarum, fœni et molendini ad ventum. *Item, quod habeat* omnimodas oblationis, obventiones, et legata quæcumq; ipſi eccleſiæ, vel ejus intuitu, relicta ac cætera, quæ cum corporibus mortuorum delata, *de jure, vel conſuetudine, debeantur eccleſiæ, ac* omnia alia, quæ ad alteragium *noſcuntur pertinere. Et præter hoc ordinamus, quod idem vicarius, ſingulis annis, habeat et* percipiat a vobis abbate et conventu, *in feſtis Sancti* Michaelis, *et* Paſchæ, *per æquales portiones,* quinq; marcas legalium ſterlingorum, de prædictis decimis garbarum, *ſibi per vos debitè exſolvendum, in augmentatione portionis ſupra dictæ. Quam vero vicariam, ad noſtram, ſucceſſorum quæ noſtrorum epiſco-*

perum Londinenſium, *et capituli noſtri, ſede vacante* Londinenſe, *collationem; quotiens vacaverit, reſervamus et pertinendam fore decrevimus, et ordinamus. Salvis nobis, et ſucceſſoribus noſtris, in eâdem eccleſiâ parochiali, lege juriſdictione et dioceſanâ; ac omnibus aliis juribus, tam nobis quam cæteris de jure debitis, vel conſuetis, et ſalvâ in omnibus dignitate eccleſiæ noſtræ cathedralis. Dictus vero* vicarius omnia onera ordinaria præter cancelli refectionem aut re-ædificationem, ſuſtinebit. *Abbas autem, et ejus ſucceſſores, qui pro tempore erint, tanquam rectores ſupradictæ eccleſiæ parochialis de* Eaſtham, *nomine ipſius eccleſiæ, nobis noſtriſque ſucceſſoribus, et aliis ordinariis ſicut eccleſiarum rectores noſtræ dioceſis, canonicam exhibebunt obedientiam, reverentiam, et honorem.* In cujus rei teſtimonium *huic ſcripto tripartito indentato, videlicet parti, penes predictos abbatem & conventum, remanenti, ſigillum noſtrum, parti vero, penes nos remanenti, ſigillum, quo utuntur dicti abbas et conventus, et parti, penes capitulum remanenti, ſigillum tam noſtrum, quam dictorum religioſorum, ſunt appenſa. Datum* Londoni, *nonis* Aprilis, *Anno Domini milleſimo trecenteſimo nono.*"

That by one of the ſtatutes for the diſſolution of monaſteries made in the reign of *Henry* the *Eighth*, the poſſeſſion of the abbot and convent of *Stratford*, and amongſt other things the rectory of the pariſh and the pariſh church of *Eaſtham* were veſted in the crown.

That by grant of the 10th of *May*, 36 *Henry* VIII. the king under his great ſeal granted to *Richard Breme*, and his heirs, all that his manor of *Eaſtham*, and all his rectory and church of *Eaſtham* with their appurtenances lying in the county of *Eſſex*, and granted, that the ſaid *Richard Breme* and his heirs ſhould hold and

and enjoy the ſame in as full and ample manner as the late abbot of *Stratford*, in right of the monaſtery, held the ſame before the diſſolution; under which grant and ſeveral meſne conveyances the late defendant, the ſaid Dr. *Wilkes*, now deceaſed, and the defendant *Frances* his now widow, and the defendant *Charles Hitch* were, and the ſaid defendants *Frances Wilkes* and *Charles Hitch* now are, intitled to the ſaid impropriate rectory.

January 1756 plaintiff collated to the vicarage of *Eaſtham*.

In *January* 1756, the plaintiff was collated to the vicarage of the ſaid pariſh church of *Eaſtham*, and was duly inſtituted, and became intitled to the ſeveral tithes within the ſaid pariſh and other emoluments with which the vicarage was endowed by the above inſtrument of appropriation.

In *November* 1756 bill in *Chancery* brought by plaintiff.

The plaintiff in *November* 1756 filed his bill in the high court of *Chancery*, ſtating that the defendants *Bennet* and *Johnſon* occupied and enjoyed ſeveral lands, and two meſſuages, and ſeveral parcels of land in the ſaid pariſh of *Eaſtham*, and in the year 1756 planted and ſowed, in ſeveral parcels of ſuch land, ſeveral quantities of beans and peaſe, and that great or conſiderable part thereof, they from time to time, about the months of *July* and *Auguſt* 1756, gathered, or cauſed to be gathered by the hand in the field by plucking them from the ſtalk whilſt they were green, and ſent the ſame to ſeveral markets, and there ſold and diſpoſed of the ſame; and that the beans or peaſe ſo ſowed or planted, or ſome part thereof, was or were of ſuch ſort or kind as are always or for the moſt part gathered green for the food of man, and that all or great part thereof were planted, gathered, and ſold by the defendants for that purpoſe; and inſiſted, that he, as vicar, was intitled to the tithes thereof,

of, and prayed an account and ſatisfaction for the ſame.

Anſwer of the defendants *Bennet* and *Johnſon.*

The defendants put in their anſwers, and the defendant *Bennet* ſaid, that in the year 1756, he ſowed thirteen acres or thereabouts with peaſe and beans in the open fields in the ſaid pariſh, and believed that in *June*, *July*, and *Auguſt*, 1756, he gathered ten acres and an half, or thereabouts, of the ſame by the hand in the field, by plucking them from the ſtalk whilſt they were green, and ſold them in a cart by retail, by the peck and ſmaller quantities, in and about the pariſh of *Eaſtham* and in the ſtreets of *London*, and the remainder of ſuch peaſe and beans were gathered into a barn and threſhed; and the defendant *Johnſon* ſaid he ſowed five acres of beans and peaſe, in the open fields in the ſaid pariſh, and believes he gathered ſome part thereof by the hand, by plucking them from the ſtalk whilſt green, and ſold a ſmall part thereof at *Eaſtham*, and other parts in *London* ſtreets, and at market, and gathered and threſhed the remainder in the barn; and both defendants ſaid, that all their ground in the ſaid pariſh, ſowed with peaſe and beans in 1756, was, as they believed, plowed for that purpoſe, and no part thereof was dug with the ſpade, except under or near the hedges, where the ſame could not be plowed, or in ſuch places as were too wet to be plowed; and both the defendants ſaid, that the tithes of all beans and peaſe, whether gathered green or otherwiſe, having been always paid to the rector and eſteemed to belong to him, they had therefore compounded, and particularly in the year 1756, with the ſaid Dr. *Wilkes* and his wife, as ſhe is the impropriatrix of the rectory, and hoped they ſhould not be again compelled to account with the plaintiff, as vicar, for thoſe tithes, and ſubmitted the right to the judgment of the court.

The

The ſaid Dr. *Wilkes*, and the defendant, *Frances* his then wife, and the ſaid defendant *Charles Hitch* by their anſwers, inſiſted on their rights as impropriators to the ſaid rectory, *viz.* the defendant *Frances* inſiſted on her right thereto during her life; and the defendant *Hitch* to the reverſion and inheritance therein after the death of the ſaid *Frances*; and they alſo inſiſted, by their anſwer, that all beans and peaſe, whether gathered green or otherwiſe, belong to the lay-impropriator of this pariſh, and not to the vicar, and that the ſame have always been paid accordingly, and the ſaid Dr. *Wilkes* and his wife admitted, that they had compounded with the defendant *Bennet*, and that they had accepted from him two pounds five ſhillings and ſix-pence, in lieu of the tithes for beans and peaſe, which he ſet or ſowed in the ſaid pariſh, in the year 1756, and that they had compounded in the ſame manner with the defendant *Johnſon* for the ſame, at the ſum of ſeventeen ſhillings and ſix-pence, which is after the rate of three ſhillings and ſix-pence by the acre,

The defendants *Wilkes* and *Hitch*'s anſwers.

Witneſſes were examined on both ſides and the witneſſes for the plaintiff proved, that the defendants *Bennet* and *Johnſon*, in the ſummer of 1756, had peaſe and beans which grew on their lands and fields in the pariſh of *Eaſtham*, which they gathered and plucked from the ſtem green, and ſold by the peck or buſhel to be eat green for the food of families, but there was no evidence in the cauſe, that the vicars of *Eaſtham* had been uſed to take the tithes of ſuch beans and peaſe,

Witneſſes were examined for the plaintiffs and defendants.

The cauſe came on to be heard on the 22d and 23d days of *February* 1760, before the right honourable

22d and 23d days of *February* 1760 cauſe heard 10th *November* 1760, order on hearing.

the

the Lord * Keeper of the great ſeal, when his lordſhip took time to give his opinion. The cauſe ſtanding in the paper for judgment, his lordſhip was pleaſed to order and decree that the ſaid bill ſhould ſtand diſmiſſed without coſts.

Trinity Term, 2 Geo. III.
A. D. 1762.

In the *Exchequer*.

Sir *Thomas Parker*, Lord Chief Baron.
Sir *Sidney Stafford Smythe*.
Sir *Richard Adams*.
Sir *Henry Gould*.

Sir *Charles Pratt*, Attorney General.
The Honourable *Charles Yorke*, Solicitor General.
Sir *William Moreton*, Recorder of *London*.

Thorp againſt *Bendlowes*.

Coach horſes liable to pay tithe of agiſtment. 3 *Burn's* Eccleſ. Law, 433.

THORP, as rector of *Houghton* in the county of *Durham*, filed his bill againſt *Bendlowes* (amongſt other things) for the tithe agiſtment of his coach horſes, ſuggeſting that the horſes were not kept for pleaſure only, but that the defendant made a profit of them, by employing them to fetch his coals at

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* Sir *Robert Henly*. See "*Nomenclature* of *Weſtminſter-Hall*," ſubjoined to the Biographical Hiſtory of Sir *William Blackſtone*, octavo Edit. 1782.

ten

ten miles diſtance out of the pariſh, and in loading manure, bricks and wood from the pariſh of *Houghton* to the defendant's lands in the pariſh of *Darlington*, which is the next adjoining pariſh; which fact was proved in the cauſe.

The defendant, by his anſwer, inſiſted, that the horſes were kept for his coach, and for pleaſure only, and were not liable to pay any tithe for agiſtment as barren and unprofitable cattle.

The court were unanimouſly of opinion, that coach horſes were liable to pay tithe of agiſtment, and decreed the defendant to account for the ſame, and to pay the plaintiff his coſts.

Michaelmas

ture a great tithe, and excepted out of the vicar's endowment in this caſe, under the name of *garba*.

Thirdly, As to the objection, that in the preſent caſe, the peaſe and beans being plucked green, and ſold for the food of man, they are applied to the ſame uſe as beans and peaſe growing in gardens, which are a ſmall tithe; and that this tithe ought to take its denomination from the uſe the thing titheable is applied to, and is therefore a ſmall or vicarial tithe, and not within the meaning of *decimæ garbarum*; it is anſwered, that all the caſes taken together, ſerve to prove, that the law denominates and adjudges tithes to be great or ſmall, according to the nature of the thing, and not from the mode of cultivation, or uſe to which the thing is applied; and therefore in this caſe the application of the peaſe and beans in queſtion for the food of man, they not being nor falling under the denomination of tithes of gardens, technically called *decimæ hortorum* ought not to convert the tithes in queſtion into ſmall tithes.

See *ante*, 395, 396. n.

Decree affirmed. And, after a full hearing *December* 6 and 7, 1762, the lords affirmed the decree.

December

December 7, A. D. 1762.

In the *Houſe* of *Lords*.

Joſeph Sims, Clerk, —— Appellant.

Thomas Bennet, *William Johnſon*, *Frances Wilkes*, widow, and *Charles Hitch*, —— } Reſpondents.

The appellant's caſe, as appears from the ſtatement of it, on his own pleadings; extracted from the printed caſes of appeal, delivered to the Lords and counſel, with the manuſcript judgments of the Houſe indorſed thereon.

THAT the appellant humbly apprehending himſelf aggrieved by the ſaid decree of diſmiſſion of his Lordſhip, hath brought his petition and appeal therefrom to your Lordſhips, and with great ſubmiſſion hopes your Lordſhips will be pleaſed to reverſe the ſaid decree, and make ſuch further order in the premiſſes as the nature of the caſe will admit, and to your Lordſhips ſhall ſeem meet, among others) for the following

REASONS.

Firſt, It is admitted by the reſpondents, that if the tithe of peaſe and beans, cultivated in a garden-like manner, and gathered by the hand whilſt green, is a ſmall tithe, the ſame is not included in the exception out of the vicar's endowment; many arguments may be offered to prove it ſuch. The quality of all tithes is to be determined at the time of ſeverance, when the right accrues, the ſame thing which

REASONS.

1*ſt*. Becauſe the vicar cannot claim tithes of any kind, but by endowment or by uſage, which is only evidence of endowment. In this caſe there is no evidence of uſage, and therefore, if the vicar is not intitled to the tithes in queſtion under the above endowment, he is not intitled at all. But,

2*dly*. By the endowment the tithes in queſtion are excepted out of the grant to the vicar; for the words (*decimas garbarum*) in the exception have been always conſidered as technical terms, appropriated to and deſcriptive of great tithes, and to diſtinguiſh them from ſmall tithes. And *garba* in its ſignification comprehends peaſe and beans growing in fields, as well as all other corn and grain growing in fields, ſo that peaſe and beans are in their own nature a great tithe, and excepted out of the vicar's endowment in this caſe, under the name of *garbæ*.

Garba what.

Objection. But it is inſiſted, that in the preſent caſe, the peaſe and beans being plucked green, and ſold for the food of man, they are applied to the ſame uſe as peaſe and beans growing in gardens, which are a ſmall tithe, and that this tithe ought to take its denomination from the uſe the thing titheable is applied to, and therefore is a ſmall or vicarial tithe, and not within the meaning of *decimæ garbarum*.

Anſwer. All caſes relative to tithes, taken together, ſerve to prove, that the law denominates and adjudges tithes to be great or ſmall, according to the nature of the thing, and not from the mode of cultivation, or uſe to which the thing is applied; and therefore in this caſe the application of the peaſe and beans in queſtion

queſtion for the food of man, they not being nor falling under the denomination of tithes of gardens, technically called *decimæ hortorum*, ought not to convert the tithes in queſtion into ſmall tithes.

3dly, There is no evidence to prove the plaintiff, or any of his predeceſſors, vicars in the ſaid pariſh, to have ever been in poſſeſſion of the right to the tithes claimed by the bill, there being no evidence that the vicars of *Eaſtham* have been ever uſed to take the tithes of ſuch peaſe and beans; and therefore as the plaintiff's right to the tithes in queſtion was not eſtabliſhed at law, the court could not decree him an account thereof upon his ſaid bill.

Die Martis, 7 *Decembris* 1762. Ordered and adjudged that the appeal be diſmiſſed, and that the decree therein complained of, be, and the ſame is hereby affirmed. Decree affirmed.

See the original cauſe under Term, Geo.

Trinity Term, 3 Geo. III.

A. D. 1763.

In the *Exchequer*.

Torriano againſt *Legge*, and others

BILL for tithes in kind, of the pariſh of *Chinkford* in *Eſſex*, the defendant ſet up nine *moduſes*, *viz.* Nine *moduſes* over-ruled in the *Exchequer*, without directing an iſſue to try their exiſtence. 1 *Black.* Rep. 420, 421.

I. A *modus* of five ſhillings an acre, for all land ſown with wheat in lieu of all tithes of wheat. *Modus* of 5*s.* *per* acre for all land ſown with wheat, in lieu of all tithes of wheat, too rank as approaching too near the real value of the tithes.

So a *Modus* of 4*d.* upon every orchard, in lieu of tithe of all fruit trees within the parish, because it is a *modus* of one tithe in lieu of another.

IX. A *modus* of four-pence upon every orchard, in lieu of tithe of all fruit trees within the parish.

This *modus* was laſtly over-ruled, becauſe it is a *modus* of one tithe in lieu of another; had it been in lieu of all orchards, or fruit growing in all orchards, it might have been good.

The court, upon the whole, decreed on account for all the tithes in kind, without directing any iſſue to try the exiſtence of any one of them.

Michaelmas Term, 5 Geo. III.

A. D. 1765.

In the *Exchequer*.

Mather againſt *Holmwood*.

Wheat muſt be cut down before tithe thereof can be ſet out. 5 *Bac.* Abr. 74. pl. 9.

IT was ſaid by the court, that all the wheat growing in a field muſt be cut down, before the tithe of any part of it can be ſet out.

See the caſe of *Erſkine* againſt *Ruffle*, under *Michaelmas* Term, 9 Geo. III. *contra*.

Trinity

Trinity Term, 5 Geo. III.

June 17, A. D. 1765.

In *Chancery.*

His Majeſty's Attorney General, at the relation of the Reverend *John Blair*, Doctor of Laws, Rector of *Burton Coggles*, in the county of *Lincoln*; the ſaid Dr. *Blair*, in his own right; and *John* Lord Biſhop of *Lincoln*, } Plaintiffs.

John Cholmeley Eſquire, *John Hopkinſon*, and *George Nidd.* } Defendants.

The plaintiff's caſe, as ſtated by his own pleadings, extracted from the printed caſes of appeal, delivered to his counſel and the Lords, previous to the hearing, with the manuſcript judgment of the Houſe indorſed thereon.

HIS late Majeſty being, in right of his crown, intitled to the advowſon, and right of preſentation to the rectory of *Burton Coggles*, in the county of *Lincoln*, did, in *November*, one thouſand ſeven hundred and fifty-ſix, by the then Lord High Chancellor, preſent the plaintiff Doctor *Blair* to the ſaid rectory, who was afterwards duly inſtituted and inducted thereto, and by virtue thereof became intitled to all the great and ſmall tithes, oblations, and tenths ariſing from the lands within the ſaid pariſh, and likewiſe to the glebe lands annexed to the rectory.

An agreement by parſon, patron, and ordinary, confirmed and eſtabliſhed by a decree in equity, can only bind the parties thereto.

The defendant *John Cholmeley* is owner of all the lands within the pariſh, except the glebe, and the defendants *Hopkinſon* and *Nidd*, as tenants to the defendant *Cholmeley*, have, ever ſince the year one thouſand

thouſand ſeven hundred and fifty-ſix, occupied very conſiderable farms within the ſaid pariſh.

The plaintiff Doctor *Blair*, ſoon after he was preſented to the ſaid rectory, was informed that there was an annual ſum of ninety-ſix pounds, eight ſhillings, and three pence, payable to him as rector, in lieu of all tithes ariſing within the pariſh, and found that his next immediate predeceſſor in the ſaid rectory, had received the ſaid annual ſtipend in lieu of tithes; and not being then informed of the ground and foundation of the ſaid payment, but apprehending that it was an ancient and adequate *modus* or compoſition, legally eſtabliſhed in lieu of tithes, to which he was intitled of common right, he did, till the beginning of the year one thouſand ſeven hundred and ſixty-two, acquieſce under and receive the ſaid annual payment; but being then apprized, that it was a payment made only upon the footing of a fraudulent agreement, entered into in the year one thouſand ſix hundred and ſixty-four, between the then owners of the lands within the pariſh, and the rector or incumbent of the rectory, and of an amicable decree made by the court of Chancery upon the 2d of *July*, one thouſand ſix hundred and ſeventy-ſeven, in a cauſe in which the ſaid owner and rector, together with the then Lord Biſhop of *Lincoln*, were the only parties, and that the compenſation pretended to be made by the ſaid agreement to the then rector, in lieu of the tithes, was to the greateſt degree inadequate and fraudulent at the time of entering into the ſaid agreement, and that there were not the proper and neceſſary parties, either to the agreement or decree, and conſequently that the whole tranſaction was illegal, and by no means binding, either upon the crown as patron of the rectory,

rectory, or upon the ſucceſſor of the ſaid then rector; the plaintiff Dr. *Blair* therefore, in the beginning of the year one thouſand ſeven hundred and ſixty-two, applied to the defendants to have the great and ſmall tithes ſet out and allotted to him in kind, or to have a ſuitable and adequate payment made to him in lieu of, and as a compoſition for ſuch tithes; but the defendants refuſed to comply with the plaintiff's demand.

Plaintiff files information.

His Majeſty's then attorney general on behalf of his *Majeſty*, the patron of the rectory, and at the relation of the plaintiff Dr. *Blair*, and the ſaid plaintiff Dr. *Blair* in his own right, filed their bill in the court of *Chancery* againſt the defendants, praying that the ſaid decree might be declared null and void, as againſt his *Majeſty* and his ſucceſſors, patrons of the ſaid church, and the plaintiff Dr. *Blair*, and all future incumbents of the ſaid rectory, and for an account of tithes become due to the plaintiff *Blair* ſince the 12th of *January* 1762, in reſpect of the lands in the occupation of the defendants, and that the plaintiff *Blair* might receive a full ſatisfaction for the ſame, the ſaid plaintiff thereby waiving all penalties, by reaſon of the defendants or any of them ſubſtracting or ſetting out the ſame, and by his ſaid bill agreeing to accept of the ſingle values of all ſuch tithes.

The defendants anſwer.

The defendants by their anſwer admitted, that the advowſon patronage and right of preſentation to the ſaid rectory belonged to the crown, and that the plaintiff Dr. *Blair* was duly preſented to and inſtituted and inducted therein, and as rector became intitled to all the tithes within the pariſh payable to the rector; and admitted the ownerſhip and occupation

tion of lands within the pariſh, and that they had taken the tithes thereof to their own uſe ſince the ſaid 12th of *January* 1762, but inſiſted that the plaintiff, Dr. *Blair*, was not intitled to tithes in kind as claimed by the bill, for that by articles of agreement dated 21ſt of *January*, 1664, made between *Montague Cholmeley*, Eſq; an anceſtor of the defendant *Cholmeley*, and *Henry Hall*, Eſq; the then owners and proprietors of all the lands within the ſaid town and pariſh of *Burton Coggles* of the one part, and *William Ayſcough*, Clerk, the then rector of the ſaid rectory, of the other part, reciting amongſt other things that there was a general incloſure agreed upon and intended to be carried into execution, between the ſaid parties, touching the field of *Burton Coggles*; and that for as much as the ſaid parties had agreed, that a conſiderable part of the lordſhip ſhould ſtill be kept in tillage for the maintenance of huſbandry, and had likewiſe agreed to better and advance as well the ſaid rectory and yearly profits thereof and thereout ariſing to a conſiderable value over and above what the ſame had been theretofore yearly worth and let for, as well as their own lands; further reciting, that the glebe lands belonging to the ſaid rectory did not conſiſt of above eighty-four acres, nor the ſaid rectory and glebe lands, with all manner of tithes thereto belonging, had not been let for above 100l. *per annum*; it was therefore agreed, that the ſaid *Cholmely* and *Hall* did thereby covenant with the ſaid *Ayſcough* and his ſucceſſors, that he ſhould for ever thereafter enjoy the ſeveral parcels of ground therein particularly mentioned and by him choſen in lieu of the glebe lands formerly uſed with the ſaid rectory, and which ſeveral parcels of ground are therein mentioned to contain one hundred and thirteen acres, one rood, and thirty-ſix perches, which were therein recited to be of far greater annual value

value than the ſaid eighty-four acres of glebe; in conſideration thereof the ſaid *Montague Cholmeley* did, for himſelf and his heirs, covenant with the ſaid *Ayſcough* and his ſucceſſors, incumbents of the ſaid rectory, to pay yearly to him and them the ſum of thirty-five pounds thirteen ſhillings, in ſatisfaction of all tithes great and ſmall, to grow due to the ſaid *Ayſcough* and his ſucceſſor by the ſaid *Cholmeley* or any of his tenants in the ſaid pariſh, (except as therein and herein after mentioned) which ſum was agreed to be charged upon the lands therein mentioned, and reputed to be of the yearly value of fifty pounds, part of which ſaid ſum, namely eight ſhillings and three-pence, was thereby agreed to be paid by the ſaid *Cholmeley* and his heirs, to the intent that the ſaid *Ayſcough* and his ſucceſſors ſhould pay the tithes of a cloſe therein mentioned, called *Pickworth paſture*, to the parſon or vicar of *Baſingthrope*, within which the ſame lieth; and the ſaid *Henry Hall* did thereby, for himſelf and his heirs, covenant in the like manner to pay the yearly ſum of forty-four pounds, fifteen ſhillings and three-pence, in ſatisfaction of all tithes due from him or his tenants, (except as therein and herein after is mentioned) and which ſum of forty-four pounds, fifteen ſhillings and three-pence, was agreed to be charged upon the lands therein mentioned and reputed of the yearly value of fifty-five pounds; and it was further agreed, that the ſaid *Cholmeley* and *Hall* ſhould for ever thereafter enjoy ſuch part of the glebe lands belonging to the ſaid rectory, as ſhould happen to be incloſed within any of the plots of ground newly incloſed within the ſaid lordſhip and taken in by them reſpectively, without any claim to be thereto made by the ſaid *Ayſcough* or his ſucceſſors, diſcharged from the payment of all tithes whatſoever, (excepting and always reſerving to the

the ſaid *Ayſcough* and his ſucceſſors the benefit of all marriages, chriſtenings, churchings, burials, and *Eaſter* offerings, thereafter happening within the ſaid pariſh) and that it was further agreed, that the ſaid *Ayſcough* and his ſucceſſors ſhould for ever thereafter be diſcharged of all conſtable lays, as well for repair of high ways as otherwiſe, and of all duties and payments, as well to church as poor, (except ſuch poor as might thereafter fall upon the town by reaſon of perſons inhabiting it, or the parſonage houſe or cottage thereto belonging) which perſons were at all times thereafter to be relieved by the ſaid *Ayſcough* and his ſucceſſors.

Anſwer of the defendants.

The defendants by their anſwer ſaid they believed that in purſuance of the ſaid articles of agreement all the lands within the ſaid pariſh were incloſed and enjoyed according to the ſaid articles, and particularly that the rectors of the ſaid pariſh have ever ſince enjoyed the ſaid one hundred and thirteen acres, one rood, and thirty-ſix perches, and that the ſame were then enjoyed by the plaintiff *Blair*; and they further ſaid, that the ſums of money agreed to be paid by the ſaid *Cholmeley* and *Hall* were received with the rents of the ſaid one hundred and thirteen acres, one rood, and thirty-ſix perches by the ſaid *Ayſcough*, and afterwards by *John Adamſon* his ſucceſſor in the ſaid rectory, in lieu of all their tithes and former glebe lands till the year 1677; but that in the year 1677 *Adamſon* declining to abide by the agreement, ſaid *Montague Cholmeley*, together with the infant daughter and heirs of the ſaid *Henry Hall* then deceaſed, exhibited their bill in the court of *Chancery* againſt *Thomas* the then Lord Biſhop of *Lincoln*, within whoſe dioceſe the ſaid pariſh of *Burton Coggles* lies, and againſt the ſaid *John Adamſon*, to carry the ſaid articles of agreement into

into execution, and to be quieted in the poſſeſſion of their lands againſt the claims of the ſaid *Adamſon* otherwiſe than under the ſaid articles, and that the ſaid *Adamſon*, by his anſwer, refuſed to perform the agreement unleſs the plaintiff in the ſaid ſuit would agree to what he had propoſed, and which they or their agents had promiſed, *viz.* to add ſixteen pounds to the eighty pounds, eight ſhillings, and three-pence, that is to ſay ſeven pounds, one ſhilling, and ten-pence, by the ſaid *Montague Cholmeley*, and eight pounds, eighteen ſhillings, and two-pence, by the ſaid Mr. *Hall*, which if they conſented to, and would ſecure the ſame on all the lands within the ſaid rectory, he was willing the ſame ſhould be confirmed by a decree; and that the ſame cauſe was heard upon the 2d of *July* 1677, when it was decreed, that the ſaid articles ſhould ſtand ratified and confirmed, to be obſerved and performed by all the parties, plaintiffs and defendants, their heirs, ſucceſſors, executors, adminiſtrators and aſſigns; and that it was thereby decreed according to the offer in the ſaid defendant's anſwer, that over and beſide the annual ſum by the articles agreed to be paid by Mr. *Cholmeley* in lieu of tithes, the ſaid Mr. *Cholmeley*, his heirs and aſſigns, has and their tenants ſhould pay the additional annual ſum of ſeven pounds, one ſhilling, and ten-pence, being in all forty-two pounds, fifteen ſhillings, and two-pence; that the ſame ſhould be charged on all the lands of the ſaid Mr. *Cholmeley* within the pariſh; and that the ſaid infant daughters and heirs of Mr. *Hall*, their heirs and aſſigns and their tenants, ſhould pay in like manner the additional annual ſum of eight pounds, eighteen ſhillings, and two-pence, being in all fifty-three pounds, thirteen ſhillings, and five-pence; and that the ſaid plaintiff and defendant *Adamſon*, their heirs, ſucceſ-

ſors, and aſſigns, ſhould for ever thereafter hold and enjoy the ſeveral parcels of lands allotted to them by the ſaid articles, in lieu of their antient lands and glebe, againſt each other, and againſt all other perſons claiming under them or under the ſaid *Henry Hall* deceaſed, according to the intent of the ſaid articles, and that the plaintiffs in the ſaid ſuit, their heirs and aſſigns, paying the ſaid annual ſums of forty-two pounds, fifteen ſhillings, and two-pence, and fifty-three pounds, thirteen ſhillings and five pence, ſhould ſtand diſcharged from the payment of all tithes according to the ſaid articles.

The defendants by their anſwer admitted, that the anual payment of ninety-ſix pounds, eight ſhillings, and three-pence, is not an adequate compenſation for the tithes in kind of the pariſh; but inſiſted, contrary to fact, that there were twenty-nine acres, one rood, and thirty-ſix perches of glebe allotted to the rectory by the articles of agreement, in addition to the eighty-four acres of glebe before poſſeſſed by him; and that upon the whole the annual value of the rectory was much increaſed by means of the articles and decree.

The defendants by their anſwer admitted, that neither the patron or ordinary were parties to the agreement, and that his then Majeſty, or his attorney general on his behalf, was not a party to the ſuit, in which the ſaid decree of 1677 was pronounced, but inſiſted, that the ſaid articles and decree were binding on the plaintiff Dr. *Blair* and his ſucceſſors.

The defendants by their anſwer inſiſted, in future bar to the plaintiff Dr. *Blair*'s claim of all manner

manner of tithes in kind, that in *Hilary* Term, in the third year of the reign of King *James* the *Firſt*, *Thomas Bell*, the then rector, having inſtituted a ſuit in the ſpiritual court againſt *John Nix*, then a houſeholder in the ſaid pariſh, for ſubſtraction of tithes, ſaid *Nix* applied to the court of *King's-Bench* by way of prohibition, to reſtrain the ſaid *Bell* from proceeding in the ſaid ſuit; and that by the record of the prohibition it appears, that certain cuſtomary payments were due to the ſaid *Bell*, as rector, in lieu of tithes in kind.

The plaintiff, the Lord Biſhop, by his anſwer ſaid, that he had no other concern in the matters in queſtion, than as ordinary of the dioceſe, and ſubmitted, whether the decree of 1677 was binding on his Majeſty, the patron of the ſaid rectory, as his then Majeſty's attorney general was no party to the ſaid ſuit, and conſequently had no opportunity of controverting the agreement in the ſaid decree mentioned.

The anſwer of the defendants being replied to, and the cauſe being at iſſue, divers witneſſes were examined, as well on the part of the defendants as of the plaintiff Dr. *Blair*.

The only matter upon which both the defendants and plaintiffs entered into proof, was to aſcertain, from old * terriers and ſurveys, the quantity of the glebe to which the rector was intitled before the articles of the agreement; and as to the quantity which he now enjoys, on the one hand it is contended by the defendants, that the rector was, before

* Which ſee at the end of this caſe.

the time of entering into the agreement, intitled only to eighty-four acres of glebe, and that upwards of one hundred and thirteen acres having been allotted to him by the articles, (and of which they ſay the ſeveral rectors have been ever ſince in the poſſeſſion); in that reſpect therefore the agreement was very beneficial to the rectors, and conſequently to the patron: And on the other hand it is contended, by the plaintiff Dr. *Blair*, and proved from four different terriers, that the quantity of the glebe which the rector enjoyed, before the time of entering into the agreement, was above one hundred and two acres, of which eighty-four acres, three roods, thirteen perches, were arable, and ſeventeen acres, two roods, ſeventeen perches, were antient incloſure, and a ſmall part meadow, amounting in the whole to one hundred and two acres, one rood, thirty perches, as alſo a right of common of two cow-gates, and ten ſheep-gates, annexed to an antient cottage belonging to the rectory, which, with the right of common belonging to the original glebe lands of one hundred and two acres, were fully equal to the one hundred and thirteen acres of the preſent glebe; and it appears, that the miſtake in the agreement, which mentions the whole quantity of antient glebe lands as conſiſting only of eighty-four acres, upon which the defendants have laid great ſtreſs, aroſe from the quantity of arable land only, being eighty-four acres and upwards, over and above the ſeventeen acres, two roods, ſeventeen perches, of antient incloſure; for the fact ſeems to ſtand thus, that between the year 1649, and 1662, the dates of the two terriers, both being prior to the agreement of 1664, the then incumbent, Mr. *Aiſcough*, made a private exchange of the eighty-four acres of arable land, which laid diſperſed at the time

The appendix contains the four terriers at full length, which ſee.

in

in four fields, for the ſame quantity of acres of land in two fields, eighty of which in one field laid contiguous to the parſonage houſe, and four in another at ſome diſtance: He alſo made another exchange of an old cloſe of eleven acres, called *Acron croft*, being within the pariſh, for a cloſe called *Pickworth paſture*, containing the ſame quantity of land, but adjoining to the other eighty acres, and laying in the pariſh of *Baſingthrop*; and as this cloſe was chargeable for tithes to the vicar of that pariſh, they agreed to pay the rector of *Burton Coggles*, a ſum of eight ſhillings and three-pence annually, as an equivalent for diſcharging the tithes due to the ſaid vicar of *Baſingthrop*; ſo that at the time of the incloſure and agreement in *January*, 1664-5, there clearly appears to have been only an addition made to the glebe of about ten or eleven acres, as a compenſation for the rights of common belonging to the ſaid glebe and cottage; and it likewiſe appears, that the preſent glebe is exactly the ſame as that deſcribed in the two laſt terriers prior to the agreement, with the addition only of eleven acres for the ſaid rights of common.

The cauſe came on to be heard before the late Lord Chancellor, upon the *15th of May*, 1765, and was argued upon that day, and the *17th* of the ſame *May*; and upon the *17th of June*, 1765, his Lordſhip pronounced his judgment thereon, and was pleaſed to order and decree, that the information of the plaintiffs, his Majeſty's attorney general, and Dr. *Blair*, ſhould ſtand diſmiſſed out of the court as againſt the plaintiff, the Lord Biſhop of *Lincoln*, and decreed, that it ſhould be referred to one of the Maſters of the court, to take an account of the value of the tithes had, accrued, ariſen, and renewed,

upon the ſeveral eſtates in the poſſeſſion of the defendants, from the time of filing the ſaid information; and it was ordered, that what ſhould be coming on the balance of the ſaid accounts, ſhould be paid by the defendants to the plaintiff Dr. *Blair*; and as between the plaintiff Dr. *Blair* and the defendants, his Lordſhip did not give any coſts to that time, but reſerved the conſideration of ſubſequent coſts, till after the ſaid Maſter ſhould make his report.

The defendants, and the plaintiff Dr. *Blair*, proceeded in taking the account before the Maſter from the time of pronouncing the decree, till the month of *November*, 1767.

The Defendant's Caſe, as ſtated by his own Pleadings.

Burton Coggles an uninclоſed pariſh before 1664.

The lands within the pariſh of *Burton Coggles*, in *Lincolnſhire*, lying open and intermixed, before the year 1664, in that year the rector, who had glebe lands, and *Mountague Cholmeley* and *Henry Hall*, Eſquires, owners of all the reſt, came to an agreement for dividing and incloſing the ſame, *viz.*

21 *Jan.* 1664. Articles for the incloſure.

By articles between *Mountague Cholmeley* and *Henry Hall*, Eſquires, lords of the manor in *Burton Coggles*, of the one part, and *William Ayſcough*, the then rector there, of the other part, reciting, That a general incloſure was agreed upon between the parties, touching the fields of *Burton Coggles*, and the rather, for that the parties, and their tenants, could not make the beſt profit of their lands, nor the ſaid *William Ayſcough* of his glebe lands, by reaſon of daily treſpaſſes, to the great deſtruction of the corn and graſs, nor the tenants well able to manage their arable

arable lands, for want of incloſures, to maintain their plough cattle: And foraſmuch as the parties had agreed, that a conſiderable part of the lordſhip ſhould be ſtill kept in tillage, and had likewiſe agreed to better and advance the ſaid rectory, to a conſiderable yearly value above what the ſame had been theretofore yearly worth, and let for, as their own lands; and for that it would be leſs trouble to the ſaid *William Aſcough*, and all ſucceeding incumbents, to receive the profits and tithes belonging to the rectory, as thereafter mentioned and agreed upon, than theretofore it had been to their predeceſſors.

And reciting, That the glebe lands belonging to the rectory did not conſiſt of above eighty-four acres, and that the rectory and the glebe lands, with all manner of tithes belonging, had not been let for above one hundred pounds a year.

It was agreed by all the parties, and the ſaid *Mountague Cholmeley* and *Henry Hall*, for themſelves and their heirs, covenanted with the ſaid *William Aſcough*, and his ſucceſſors, that he the ſaid *William Aſcough*, and his ſucceſſors, ſhould for ever thereafter have and enjoy the ſeveral parcels and plots of ground therein particularly mentioned, and by the ſaid *William Aſcough* elected and choſen, in lieu of the former glebe lands of the rectory, amounting to one hundred and thirteen acres, one rood, and thirty-ſix perches, which were of far greater worth a year, than the eighty-four acres of glebe land, formerly belonging to the rectory.—In conſideration of which,

The ſaid *Mountague Cholmeley* covenanted and agreed, that he, his heirs and aſſigns, ſhould pay unto the ſaid *William Ayſcough*, and his ſucceſſors, incumbents of the rectory, the yearly ſum of thirty-five pounds and thirteen ſhillings, by quarterly payments, in lieu and ſatisfaction for all tithes, great and ſmall, thereafter to grow due to him or them, by the ſaid *Mountague Cholmeley*, or any of his farmers or tenants (except as after mentioned); which yearly ſum was to be charged upon lands therein mentioned, of the value of fifty pounds a year.

And the ſaid *Henry Hall* covenanted and agreed, that he, his heirs and aſſigns, ſhould pay unto the ſaid *William Ayſcough*, and to his ſucceſſors, incumbents of the rectory, the yearly ſum of forty-four pounds, fifteen ſhillings, and three-pence, by quarterly payments, in lieu and ſatisfaction of all the tithes, great and ſmall, thereof to grow due to him or them, by the ſaid *Henry Hall*, or any of his farmers or tenants (except as aftermentioned); which laſt mentioned yearly ſum was to be charged upon lands therein mentioned, of the value of fifty pounds a year.

And the ſaid ſeveral yearly ſums of thirty-five pounds, thirteen ſhillings, and forty-four pounds, fifteen ſhillings, and three-pence, ſo to be paid to the ſaid *William Ayſcough* and his ſucceſſors, were agreed to be in lieu and ſatisfaction of all tithes that the ſaid *William Ayſcough*, and his ſucceſſors, ſhould have or claim, out of any lands of the ſaid *Cholmeley* and *Hall*, in any manner whatſoever.

And it was further agreed by all the parties, that the ſaid *Cholmeley* and *Hall*, their heirs and aſſigns, ſhould

ſhould have and enjoy for ever, all ſuch parcels of glebe lands as ſhould happen to be incloſed within any of the plots or parcels of ground taken in by the ſaid *Cholmeley* or *Hall* reſpectively, without any claim to be made by the ſaid *William Ayſcough*, or his ſucceſſors, diſcharged of and from the payment of all tithes whatſoever: excepting and always reſerving unto the ſaid *William Ayſcough*, and his ſucceſſors, the benefit of marriages, chriſtnings, churchings, burials, and *Eaſter* offerings.

The cloſure made purſuant to the articles.

Purſuant to theſe articles, all the land in the ſaid pariſh, including the eighty-four acres of old glebe, were divided and incloſed, and one hundred and thirteen acres, one rood, thirty-ſix perches, were allotted for the uſe of the rector for the time being, lying commodiouſly to the parſonage houſe; and all the ſaid lands have ever ſince been held and enjoyed according to the articles.

For better confirmation of the articles, and thirteen years after the incloſure had been made, the ſaid *Mountague Cholmeley*, together with *Frances*, *Margaret*, and *Elizabeth Hall*, infant daughters and heirs of the ſaid *Henry Hall*, by their guardian, exhibited a bill in the High Court of *Chancery*, againſt the then Lord Biſhop of *Lincoln*, within whoſe dioceſe the pariſh is, *John Adamſon*, clerk, the then rector thereof, ſtating the articles, and praying to have the ſame eſtabliſhed, and to be quieted in the poſſeſſion of their lands againſt the claim of the rector, as to glebe tithes in kind, or otherwiſe than under the articles; to which the ſaid *John Adamſon* put in his anſwer, whereby he admits the articles; and the ſaid *William Ayſcough*, for his time, and the ſaid *John Adamſon*, during ſuch time as he had been rector,

tor, had enjoyed the monies and lands by the articles agreed to be allotted, and paid to the rector for tithes and glebe; but refuſed to confirm the articles, unleſs the plaintiffs would agree to what he purpoſed, *viz.* to add ſixteen pounds *per annum* to the eighty pounds, eight ſhillings, and three-pence, provided for the rector by the articles, and ſecure the ſame on all their lands within the rectory: And the Lord Biſhop of *Lincoln* alſo put in his anſwer to the ſaid bill, and upon the ſame terms as the ſaid *John Adamſon* had propoſed, he ſubmitted to make ſuch eſtabliſhment of the incloſure and agreements aforeſaid, as the court ſhould think fit.

2 *July*, 1677. Decree whereby the articles and incloſure were confirmed.

The cauſe being brought to iſſue, and witneſſes examined therein, came on to be heard on 2d *July*, 1677, when it was decreed, that the ſaid articles, and all the matters therein contained, ſhould ſtand ratified and confirmed, to be obſerved and performed by all the parties, plaintiffs and defendants, their heirs and ſucceſſors, executors, adminiſtrators, and aſſigns, according to the tenor, true intent and meaning thereof, with addition of ſixteen pounds *per annum*, to be paid to the rector of the pariſh, and his ſucceſſors, as had been propoſed by the anſwer of the defendant *Adamſon*; and that the plaintiff and defendant *Adamſon*, their heirs, ſucceſſors and aſſigns, ſhould and might, from time to time, and at all times thereafter, hold and enjoy the ſeveral and reſpective cloſes and parcels of ground, to the plaintiff *Cholmeley*, and the ſaid *Henry Hall*, and *William Ayſcough*, reſpectively, allotted by the articles, in lieu of their antient lands and glebe, againſt each other, and againſt all other perſons claiming from, by or under the ſaid *Henry Hall*, deceaſed; and that the plaintiffs, their heirs and aſſigns, paying their annual

annual ſums therein mentioned, making together ninety-ſix pounds, eight ſhillings, and ſevenpence, to the defendant *Adamſon*, his ſucceſſors and aſſigns, as the ſame ſhall become due, the lands and tenements of the complainants ſhould ſtand diſcharged, and freed of and from the payment of tithes in kind, and of all manner of other tithes and duties, over and beſides ſuch annual ſums, (excepting marriages, chriſtenings, churchings, burials, and *Eaſter* offerings).

The ſaid *John Adamſon*, and his ſucceſſors, rector of the pariſh, and the plaintiff *Blair*, from the time of his inſtitution into the rectory in 1756, to this time, have held and enjoyed the one hundred and thirteen acres, one rood, and thirty-ſix perches, of land allotted and incloſed as aforeſaid, for the rector of the pariſh; and the plaintiff *Blair*, from the time of his inſtitution into the rectory, to the 12th *January*, 1762, received the ſeveral payments mentioned in the ſaid decree, for and in lieu of tithes of lands within the pariſh, without any claim of tithes in kind or glebe, from, or in reſpect of any lands within the pariſh, which belonged to the family of the ſaid *Montague Cholmeley*, and the family of the ſaid *Henry Hall*; all which lands do now belong to the defendant *Cholmeley* only, they having deſcended to him upon the death of his father, whoſe anceſtors purchaſed the ſame of Mr. *Hall*'s eſtates in the pariſh.

The plaintiff *Blair*'s predeceſſors have hitherto enjoyed the lands under the articles.

The plaintiff *Blair*, about ſix years after his inſtitution, *viz.* 28*th April*, 1762, exhibited a bill in the High Court of *Chancery*, in his own name, as rector of the pariſh, againſt the defendant *John Cholmeley*, as proprietor of the lands within the pariſh, and

28 April, 1762. Bill brought by the plaintiff *Blair*, for tithes in kind.

and againſt the defendants *Hopkinſon* and *Nidd*, as tenants of part thereof, and alſo againſt his Majeſty's attorney general, thereby ſetting forth, that he the plaintiff *Blair*, was, in *November* 1756, preſented by the then Lord High Chancellor, on behalf of his then Majeſty, to the rectory aforeſaid, and was thereupon inſtituted and inducted, and thereby ſet forth the ſaid articles and decree; but ſuggeſted, that the ſaid yearly payment of ninety-ſix pounds, eight ſhillings, and ſeven-pence, was not near a full adequate compenſation or ſatisfaction for all the tithes in kind, great and ſmall, and that the ſaid decree was contrary to the ſtatute * made in the time of Queen *Elizabeth*, for diſabling rectors and vicars from alienating the revenues of their churches; and that as his then Majeſty, who was patron of the ſaid rectory, or his attorney general on his behalf, was not party in the cauſe, in which the ſaid decree was made, the ſame was of no effect, ſo as to bind the crown as patron, or the incumbent of the rectory; and therefore the plaintiff *Blair* by his bill prayed, that an account might be taken of all the tithes, great and ſmall, which had grown or ariſen ſince the 12*th January*, 1762, by reaſon of the ſeveral lands in the occupation of the defendants, and that he might receive a full ſatisfaction for the ſame.

* 13 *Eliz.* chap. 10.

13 *November*, 1762. Anſwer of the defendants.

On 13th *November*, 1762, the defendant *Cholmeley* and the defendants *Hopkinſon* and *Nidd* put in an anſwer to the ſaid bill, whereby they ſaid, that they could not frame any belief as to what matters or things were titheable in the pariſh, and after what manner before the time of making the agreement of 21 *January* 1664, otherwiſe than appeared by a record upon a prohibition obtained from his Majeſty's court of *King's Bench* in *Hilary* Term, in the third year

year of the reign of his late Majeſty King *James* the *Firſt*, by one *John Nixe*, then an houſholder within the ſaid pariſh, againſt one *Thomas Bell* clerke, then rector of the church aforeſaid, to prevent him the ſaid *Bell* from proceeding in court Chriſtian, touching the titheable matters therein mentioned, and to oblige him to ſubmit the ſame to the determination and judgment of the ſaid court of *King's Bench*; and the ſaid defendants, in their anſwer, ſet forth the ſubſtance of the ſaid rector's bill, wherein ſeveral cuſtomary payments were alledged to be payable to the rector of the ſaid pariſh, for and in lieu of ſeveral *ſpecies* of tithes in kind, demanded by the ſaid bill, and ſeveral cuſtomary manners of titheing were therein alſo alledged for and in reſpect of other *ſpecies* of tithes demanded by him; and that ſuch allegation appeared on the ſaid record to have been verified by oath; and the ſaid defendants by their anſwer ſet forth, that it appeared that the ſaid court of *King's Bench* did, by a rule made in the matter of the ſaid prohibition, order that the ſaid *Bell* ſhould not proceed in the court Chriſtian againſt any other pariſhioners of the pariſh, for the like tithes for which the ſaid prohibition was then depending, until that prohibition was by ſome lawful manner determined; but that it did not by the ſaid record or otherwiſe appear, that the ſaid *Bell*, or any other perſon, did at any time afterwards in any manner deny or controvert the matters and things contained in the ſaid record; therefore they believe that the ſaid *Bell* acquieſced therein, and that he and his ſucceſſors, rectors of the pariſh, from thenceforth and until the time of making the ſaid agreement of 21 *January* 1664, did ſeverally accept all and ſingular the tithes and ſums in and by the ſaid record mentioned to have been paid or payable, in full ſatisfaction of all the titheable matters therein ſpecified,

and that the plaintiff *Blair*, or any other rector of the parish, would have been bound to accept the same accordingly, in case the said articles and decree had not been made.

The said defendants by their answer also set forth the said articles and decree of 1677, and insisted upon the benefit thereof; and upon the acquiescence of the plaintiff *Blair*, and his predecessors under the same, in bar of the tithes in kind claimed by the bill.

The said defendants also insisted, that the plaintiff *Blair* ought not to be relieved against the said agreement and decree, because, if they were of any effect, he was bound by the whole and every part thereof, and that he could not (as he attempted by his bill) abide by one part, and wave or relinquish another; and that as it was impossible, at this distance of time, to distinguish and ascertain what were the glebe lands belonging to the rectory at the time when the said agreement was made, it was therefore impossible to put the possessions and rights of the proprietors of the several lands, into the same state in which they were when the said agreement was made; and that as the plaintiff *Blair* and his predecessors had, under the said articles and decree, held and enjoyed the lands allotted to them, in lieu of their former glebe lands, which had been impossible to be distinguished; that they were therefore still bound to accept such allotted glebe lands, and the said yearly payment of ninety-six pounds, eight shillings, and seven pence, in lieu and full satisfaction of their former glebe lands, and of the tithes in kind, as mentioned in the said articles and decree; and that the said defendants believed, that the said articles and decree tended much

to

to the advantage and improvement of the rectory, and that thereby the revenues of the rectory have been conſiderably increaſed; and that although his then Majeſty, or his attorney general on his behalf, was not a party in the cauſe in which the decree was made, nevertheleſs that his ſaid Majeſty, and his ſucceſſor, had ever ſince, from time to time, preſented to the rectory without any objection to the articles and decree, or either of them; nor had any objection been made by any biſhop or ordinary of the dioceſe, or by any rector of the pariſh, or by any other perſon to the ſaid decree, before the objection made thereto by the plaintiff *Blair* by his bill.

1 *June*, 1763. amended bill filed in the name of the plaintiff *Blair*, at the relation of the Attorney General.

After the ſaid defendants had put in ſuch anſwer, the plaintiff *Blair* (under an order for amendment) filed an information and amended bill in the name of his Majeſty's attorney general, at the relation of the plaintiff *Blair*, and alſo in his the plaintiff *Blair*'s own name, againſt the defendants, ſtating and charging to the like effect as in the firſt bill, exhibited in the name of the plaintiff *Blair*; and further charging, that the rectors were immemorially intitled to an equal quantity of glebe, with what is allotted by the articles, and that they thereby gained no increaſe of glebe; but he thereby offered to abide by the ſaid articles and decree in every reſpect, except as to the yearly payment of ninety-ſix pounds, eight ſhillings, and ſeven pence; nevertheleſs it was, by the ſaid information and amended bill, prayed, that the ſaid decree might be declared null and void; and that ſuch account might be taken, and ſatisfaction made to the plaintiff *Blair* in reſpect of tithes, as prayed by his original bill.

The

Anſwer of the defendants to the information and amended bill.

The defendants *Cholmeley*, *Hopkinſon* and *Nidd*, put in an anſwer to the information, and amended bill, whereby they ſet forth, that they did not believe that the glebe lands, which formerly belonged to the rectory, conſiſted of any greater quantity than is mentioned in the articles, apprehending that, previous thereto, a meaſurement and valuation muſt have been made, and taken of all the lands within the pariſh, and particularly of the old glebe lands which lie diſperſed in very ſmall parcels; nor did they believe that the preſent glebe poſſeſſed by the plaintiff *Blair*, in right of the rectory, was of a leſs quantity than one hundred and thirteen acres; nor did they believe that the ſaid articles and decree, or either of them, tended to the prejudice of his Majeſty, as patron, or of the plaintiff *Blair*, as rector: and inſiſted that as one hundred years and upwards had elapſed ſince the execution of the ſaid articles, and the exchange and inclofure of the ſaid lands, and as the ſaid decree had been inrolled eighty-ſix years, and upwards, that the ſame ought to be declared null and void.

26 *April*, 1764. The information and bill again amended.

The information and bill was again amended on 26th *April*, 1764.

14 *Novem.* 1764. The cauſe came on to be heard; but the proceedings were irregular.

A replication was afterwards filed, and the ſaid cauſe being at iſſue, ſeveral witneſſes were examined, and proofs made therein on both ſides, and publication having paſſed, the cauſe was ſet down, and came on to be heard before the Right Honourable the then Lord High Chancellor, on 14th *day of November*, 1764; when, upon opening thereof by the complainant's counſel, it appeared to the court that the ſaid information and bill were irregular, and his lordſhip was then pleaſed to order that the cauſe ſhould

ſhould ſtand over, with liberty for the relator and plaintiff to amend the information and bill, by adding or altering parties, and to bring on the cauſe again to an hearing as he ſhould be adviſed.

Another amendment by making the Attorney General a plaintiff on behalf of the crown, and the Bishop of *Lincoln* a defendant,

Purſuant to the laſt mentioned order, the information and bill were again amended, by making his Majeſty's Attorney General a plaintiff therein, on behalf of the crown (the plaintiff *Blair* ſtill continuing a plaintiff) and alſo, by making the Right Reverend Lord Biſhop of *Lincoln* [illegible] ordinary of the dioceſe, a defendant thereto.

The cauſe being again ſet down, came on for hearing, and was heard before the then Lord High Chancellor, on 15th and 17th *May*, 1765, and on 17th *June* following, his lordſhip pronounced his judgment therein, and was pleaſed to order that the relator's information ſhould ſtand diſmiſſed, as againſt the Lord Biſhop of *Lincoln*, with coſts; and decreed that it ſhould be referred to a maſter of the court, to take an account of the value of the tithes which had accrued, ariſen and renewed upon the ſeveral eſtates in the poſſeſſion of the other defendants from the time of filing the information; and for better taking of the accounts, all parties were to be examined upon interrogatories, and to produce before the Maſter, upon oath, all books, papers, and writings in their cuſtody or power relating thereto, as the Maſter ſhould direct; and ordered that what ſhould be coming on the balance of ſuch accounts, be paid by the defendants *Cholmeley*, &c. to the relator Dr. *Blair*; and as between him and the ſaid defendants, his lordſhip did not give any coſts thereto, but reſerved the conſideration of ſubſequent coſts till after the Maſter ſhould have made his report.

17 *June* 1765.

See this caſe on appeal, under *Michaelmas* Term, 8 Geo. III.

Both the plaintiff's and the defendant's caſe, in this cauſe, as reported by Doctor Burn.

His Majeſty's Attorney, at the relation of *John Blair*, Doctor of Laws, Rector of *Burton Coggles*, in the county of *Lincoln*, and the ſaid *John Blair*, in his own right. } Plaintiffs.

and

John Cholmley, Eſquire, *John Hopkinſon*, and *George Nidd*, and *John* Lord Biſhop of *Lincoln*, } Defendants.

By the Lord Chancellor *Northington*.

Burn's Eccleſ. Law, 403, 404.

THIS is an information brought by the Attorney General, at the relation of Dr. *Blair*, for an account and payment of tithes in kind; the claim of the rector ariſes *de communi juré*; the defence ſet up againſt the claim, is firſt an *agreement* entered into, in the year one thouſand, ſix hundred and ſixty-four, between the rector and the owners of the land in the pariſh, for accepting a yearly ſum of eighty pounds, in lieu of tithe; but I am of opinion, that the agreement on the face of it is unequal, as to the conſideration thereby agreed to be paid to the rector; for it appears, that the agreement was entered into, in order to effectuate an incloſure of the open fields in the pariſh, and no conſideration is given, as to the future improvement of the lands by ſuch incloſure, of which the occupiers would reap the benefit; but I am clear, that even

if

if the agreement was equal, it would not bind the ſucceſſor in the rectory, but would be void as againſt him.

The next defence ſet up againſt the plaintiff's claim, is a *decree* in 1677, which appears to be made in a cauſe inſtituted by conſent between the ſame parties, that were parties to the agreement in 1664; for as to the biſhop of the dioceſs being a party, I conſider him as ſet up merely for form; and it is material to obſerve, that the parties themſelves did not conſider the agreement which had been executed as binding on the rector; for they conſidered the annuity of fourteen pounds, as not being an adequate conſideration for the rector's having given up his tithe in kind; and therefore they entered into a new agreement, of allowing him an addition thereto of ſixteen pounds, eight ſhillings, and ſeven pence a year; and on being allowed that addition, the rector by his anſwer conſents to have the agreement eſtabliſhed; it is true, that the decree founded on this agreement doth *in verbis* bind the ſucceſſors in the rectory; but this was a decree founded on an agreement, which the court never enter into the propriety of, when a bill is brought by conſent of parties; and all ſuch decrees are drawn up by the regiſter of the court, in the words of the agreement, as a matter of courſe; but I am of opinion, that ſuch decree cannot bind the ſucceſſor. The defendant's counſel have, it is true, cited caſes of a ſimilar nature, and urged the caſe of *Egerly* and *Price*, [which ſee under *Michaelmas* Term, 25 *Car.* II] reported in *Finch*'s reports; which I have looked into, and think it a very extraordinary one, for the judge ſent for the parties to attend him. I can pay no credit to that caſe, nor do I look on it as any authority, but only the dream of ſome note-taker in this court.

Egerly and *Price*. *Nelſon*'s reports *tempore Finch*, C. cenſured.

The agreement and the decree being laid out of the caſe, the next conſideration is, whether a court of equity can relieve in the preſent caſe? and I am of opinion, there is not a better rule than *equitas ſequitur legem*; it is a fixed rule, that the church cannot be preſcribed againſt; firſt, on account of it's high dignity; ſecondly, on account of it's imbecility, *quia fungitur vice minoris conditionem ſuam meliorare poteſt, deteriorare nequit*; at common law, altho' the church could alienate with conſent of patron, parſon, and ordinary, yet it was under various reſtrictions; the patron muſt be *abſolutely* ſeiſed in fee ſimple: if he was ſeiſed only of a fee ſimple *conditional*, or *baſe* fee, the alienation was void; in the preſent caſe, the bar ſet up by the defendants amounts to a mode of alienation; and if the decree is void, as I am of opinion it is, what then is there to ſend to law, when the point is about the extent of a decree of this court? and if it was ſent thither it muſt come back to be ultimately determined here.

Church cannot be preſcribed againſt.

It has been alſo objected, that the length of time ought in this caſe to bar the plaintiff; but I think the legal rule, that no preſcription can run againſt the church, muſt be adhered to; and indeed the length of time, in which this agreement was acquieſced under, is not ſo great as at firſt ſight it appears, for the perſon who was rector in 1677, and party to the decree, and had a right to eſtabliſh the agreement during his life, did not die till the year 1718.

Upon the whole, the incloſure of the lands was for the general benefit of the pariſh; and ſuch lands will be continually encreaſing in value, while the compoſition given to the rector, in lieu of tithes, will be gradually diminiſhing in value; the compoſi-

tion

tion here regarded only the value of the paſt tithes, without any regard to the future encreaſing value of tithes, which is always allowed for in every private bill for an incloſure; if, in the preſent caſe, the parties had made an allowance for the future improved value of tithes, I ſhould not have been inclined to relieve, but would have left the rector to his legal remedy.

I ſhall therefore * decree, that the information, as againſt the Biſhop of *Lincoln*, be diſmiſſed with coſts; and let it be referred to the Maſter, to take an account of the value of the tithes, which have accrued from the time of filing the information, and let what ſhall be coming on the balance of ſuch accounts, be paid to the relator Dr. *Blair*, and no coſts hitherto; but I do reſerve the conſideration of ſubſequent coſts, till after the Maſter ſhall have made his report, and any of the parties to be at liberty to apply to the court, as there ſhall be occaſion.

* But if inſtead of a decree in a court of equity, an act of parliament had been obtained to carry the agreement into execution, it would have been binding; but it might have been difficult to have obtained ſuch an act; for a ſum of money incertain, which is always fluctuating in value, cannot be deemed a compoſition at all events in perpetuity. 3 *Burn's* Eccleſ. Law, 405, 406.

*TERRIERS

Produced in the Court of *Chancery* by the plaintiff, extracted from the Regiſtry of the Lord Biſhop of *Lincoln*.

Burton le Coggles. A Terrier of the glebe lands, leas, and balks, with meadows, houſes, barns, and tenements belonging to the rectory of *Byrton le Coggles*, in *Lincolnſhire*, taken the 18th of *Aug.* 1634.

Imprimis, A large manſion houſe, with two barnes or lathes; one ſtable and cow-houſe, one dove-houſe, with a garden and orchard, and one homecloſe, *&c.* as alſo a cottage or tenement, with two cow-gates, and ten ſheep-gates belonging thereunto, wherein the widow *Sewley* now dwelleth.

Item, in *Corby Gate Field.*

Firſt, Four landes butting on *Richard Coy*, eaſt, and *Averie Hewlding*, ſouth-weſt, with two balks on each ſide of them.

Item, Four landes more butting on *Coy*, eaſt, *Henrie Augier*, and others, ſouth-weſt, balked on both ſides.

Item, One head-land butting on *Corby Meere*, ſouth, and *John Lenton*, north.

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* Theſe terriers are taken from the appendix to the reſpondent's caſe, in the cauſe of the Attorney General againſt *Cholmley*, in an appeal heard at the bar of the Houſe of Lords, on *Monday*, *November* 21, A. D. 1768. See this appeal by the name of *Cholmley* and his Majeſty's attorney general, under *Michaelmas* Term, 8 *Geo.* III.

Item,

Item, Seven landes in *Peaſanbarrow* upon Mrs. *Bell*, north, and divers others ſouth, balked on both ſides.

Item, Five landes upon Mr. *Hall*, weſt, *William Newman*, eaſt, and one lea upon *J. Augier*, north, balked on both ſides.

Item, Twelve landes, with a good portion of graſs ground againſt Mr. *Francis Hall*'s graſs plot, weſt, *John Augier*, eaſt.

Item, Fourteen landes, butting on *J. Richardſon*, ſouth, upon *Hurſtard*, north, balked on each ſide.

Item, Eleven landes, upon the *Muſket Sike*, north, the highway, ſouth, and a balk on the weſt.

Item, Thirty-ſix landes and leas in the *weſt field*, againſt *Tomalin's-beale*, ſouth, againſt the highway, north.

Item, In that field one cloſe, called the *Parſon's Acroncroft*, lying on *Slicht's-wood*, north, on the lane, ſouth, containing by eſtimation, about ten or eleven acres.

Lowne Field.

Imprimis, Six landes on Saint *Thomas*, croſs-furlong, ſouth, *Neat-gate*, north, and one balk, weſt.

Item, Eleven landes on the *Neatgate*, ſouth, againſt *J. Richardſon*, north.

Item, Seven landes in *Berk Furlong*, eaſt, on the *Cowgate*, weſt, againſt the parſonage leas.

Item, Three leas in *Limeſtones*, with a goare, whereof one is a head-land at full length, upon *Adam Brown*, ſouth, *Bitchfield Sike*, north.

Item, Twelve landes, with their ends, on *Bitchfield Sike*, ſouth, againſt *George Beagle*, north.

Item, Sixty landes, and one head-land, with ſixteen leas, lying north on *Lowne Wood*, ſouth, upon Mr. *Cholmeley* and Mr. *Hall*.

Item, Four leas and half the balks on each ſide of the joining to the lower end of the parſonage homecloſe.

Item, One lea and two landes in *Waterfurrows*, againſt *J. Richardſon*, north, the highway, ſouth.

Item, Two landes, with graſs ground at both the ends of them, on *Richard Bacon*, north, on the highway, ſouth.

Item, Nine landes in *Sunniwonge*, lying againſt *Rigdale*, north, and *Sunningdale*, ſouth.

Item, A portion of meadow, commonly called the *Parſon's litlings*, at the back ſide of *Decken*'s and *Watſon*'s home cloſe, by eſtimation one acre and an half.

Redhill

Redhill Field.

Imprimis, Two landes and a goare in *Brighill Furlong*, north on the hedges, ſouth againſt *Nathan Cowie*, balked on each ſide.

Item, One headland upon Mrs. *Bell*, eaſt, weſt againſt *J. Winge*.

Item, Two landes in *Lowgreene Furlonge*, upon the parſonage headland, north, and ſouth againſt *Low Greene*, with balks on each ſide.

Item, Six landes and two goares on the weſt ſide of *Low Greene*, lying ſouth upon *Rebeme-gate*, balked on each ſide.

Item, Fifteen landes on *Gunerhill*, with certain parcels of *Greenſward*, lying on *Rebeegate*, north, and ſouth upon *Averie Holding*.

Item, Twenty landes upon the *Highwood*, north, Mr. *Cholmley*, ſouth.

Item, One land at *Staſtienooke*, north upon *Capen-dale*, ſouth upon *Richard Coy*.

Item, Seven landes in *Coltſworth Dale*, againſt Mr. *Hall*, weſt, *Averie Holding* and *John Johnſon*, eaſt.

Item, Three landes near the ſame dale.

Item, Twelve landes in *Little Wall-earth*, north on Mr. *Cholmley*, ſouth upon *Richard Carter*.

Item,

Item, Eleven landes in *Great Wall-earth*, upon *Corbymear*, ſouth, and againſt the parſonage of many other lands, north.

Item, Thirteen landes in the *Creach Wange*, upon *John Richardſon*, weſt, &c.—Taken the day above written by *Edward Heron*, rector, *ibid. John Augier* and *Richard Dalby*, church-wardens; *Henry Augier* and *George Allum*, ſideſmen.

A true copy. JOHN BRADLEY, Dep. Reg.

Lincoln, October 31, 1764.

Attorney General againſt *Cholmley*.

Proved in court 6 *May* 1765, in this cauſe, by *Samuel Mitchell*.

W. Bowyer, Dep. Reg.

A Terrier of ground belonging to the parſonage of *Burton Coggles*, meaſured after ſixteen feet and an half to the pole, *Anno* 1649, copied from Mr. *Hall*'s original, *November* 6, 1773.

	A.	R.	P.
The ſituation of the parſonage cloſe and yards all adjoining containeth	4	0	12
A concroft cloſe paſture	11	0	2
A piece of meadow in *Litlings*,	2	0	2

A cottage

	A.	R.	P.
A cottage and pingle near the church-yard,	0	1	22
	17	2	17

		A.	R.	P.			
Arable in	*Lowndfield*,	32	0	34	84	3	13
	Creachfield,	15	1	28			
	Weſtfield,	6	3	20			
	Redhill-field,	30	1	11			
	Acres *in toto*				102	1	30

Towne land in Mr. *Hall's* poſſeſſion

A lee in the *Lowndfield*,					0	2	34
Meadow	*Lowndfield*,	1	0	21	8	0	22
	Weſtfield,	7	0	0			
	Total				8	3	17

The great cloſe abutting upon *Bitchfield*, *Lound Woods*, contains	58	0	20
The plowed cloſe adjoining to it, contains	10	2	28
The other cloſe of glebe next the town, called *Littling*,	25	0	32
Total	94	0	0

Surveyed by *Vincent Grant* of *Wilſtropth*, 19th of *December*, 1773.

This

This was proved to be in the hand-writing of the Reverend *John Adamſon*, formerly rector of *Burton Coggles*, by the evidence of Mrs. *Katherine Adamſon*, his daughter, taken in the cauſe.

Delivered to Dr. *Blair* with other papers, relating to the rectory of *Burton Coggles*, by *Samuel Salter*, late rector.

Extracted from the Regiſtry of the Lord Biſhop of *Lincoln*.

November 4, 1662.

A true and perfect Terrier of the gleab lands belonging to the rectorie of *Burton Coggles*.

THE parſonage houſe, with the yard, garden, and orchard, and one cloſe adjoining upon the dwelling houſe of four acres; one cloſe abuttinge eaſt upon the cloſe called the *Land Field*, in the tenure and occupation of *Henry Hall*, Eſq; and abutting weſt on *Lound Leer*, in the tenure and occupation of *John Collingwood*, and abutting north upon *Lound Wood*, in *Bitchfield* lordſhip, and ſouth upon the parſonage homecloſe, and other cloſes thereunto adjoined, containing fourſcore and two acres; one cloſe in weſt by lordſhip, abutting eaſt upon *Lowne Wood*, weſt upon *Pickeworth* paſture, now in the tenure and occupation of *Henry Carter*, and *Valentine Lenton*, north, upon *Cow Bottoms*, in the tenure and occupation of *John Smith*, and north upon the forementioned parſonage cloſe, containing eleven acres; one cottage joyning upon the church-yard, one rood, one cloſe being in *Redhill-field*, abutting upon *Oſgrave wood*, eaſt, and one cloſe in the tenure and occupation of *John Harbe*, north, and one other cloſe in the

the tenure and occupation of *Henry Hall*, Eſq; ſouth, and upon the highway weſt, containing four acres.

One pingle adjoining upon the church-yard, two roods.

William Ayſcough, Rector.

John Warner, *Robert Lenton*, Church-wardens.

A true copy. *John Bradley*, Dep. Reg.

Lincoln, *October* 31, 1764.

Attorney General againſt *Cholmley*.

Proved in court 6th *May*, 1765, in this cauſe, by *Samuel Mitchell*.

W. Bowyear, Dep. Reg.

Extracted from the Regiſtry of the Lord Biſhop of *Lincoln*.

November 4, 1664.

A true and perfect Terrier of all the gleab lands, belonging to the rectory of *Burton Coggles*.

THE dwelling-houſe, with the outhouſes, yard, and homecloſe adjoining, containing five acres.

One cloſe abutting upon the ſaid homecloſe, and the homecloſe of *Thomas Watſonne*, and the homecloſe of *Nathaniel Allum*, and the homecloſe of *John Waterfall*, ſouth, and upon *Bitchfield Lound wood*, north,

north, and *Lound* lese close, west, containing fourscore and two acres.

One close lying in *Westbie Field*, abutting upon *Cowbottom* close, north, upon the aforesaid close belonginge to the rectory of *Birton Coggles*, south, and upon *Pickworth* pasture close, west, and *Bitchfield Lound wood*, east, containing eleven acres.

One close in *Redhill Field*, abuttinge upon *Osgrave Wood*, south, upon the highway, north, upon *Eamswell* close, west, and upon *Eaceps* close, east, containing four acres.

One cottage with the yard abutting upon the church-yard, and one *pingle* abutting upon the church-yard, and on the street way, containinge one acre.

William Aynough, Rect.

A true copy. *John Bradley*, Dep. Reg.

Lincoln, *October* 31, 1764.

Attorney General againſt *Cholmly*.

Proved in court, 6th *May* 1765, in this cauſe, by *Samuel Mitchell*.

W. Bowyear, Dep. Reg.

A Terrier

A Terrier produced in the court of *Chancery* by the defendants.

Extracted from the Regiſtry of the Lord Biſhop of *Lincoln.*

A true Terrier of the glebe lands belonging to the rectory of *Burton Coggles*, given in at the Lord Biſhop of *Lincoln*'s viſitation, held at *Stamford*, 14th *Auguſt*, 1671.

ONE cloſe lying on the north ſide of the parſonage houſe, containing four acres and twelve pearches.

An houſe and pingle by it, adjoining to the church yard, containing one rood and twenty-two pearches.

One plott or parcell of ground, adjoining upon *Bitchfield Lound wood*, containing nine-four acres, more or leſs.

One parcell of ground adjoining upon *Oſgrave wood*, containing four acres.

One other cloſe, called *Pickworth paſture cloſe*, in *Weſtley*, within the pariſh of *Baſſingthorpe*, containing eleven acres more or leſs.

John Adamſon, Rect. *ib.*
Thomas Watſon.
His
Eſau ✗ *Brown.*
Mark

Michaelmas.

Michaelmas Term, 8 Geo. III.

November, A. D. 1767.

In the *Houſe* of *Lords*.

Mountague Cholmeley, Eſq; * Heir at Law, and perſonal Repreſentative of his Father, *John Cholmeley*, Eſq; deceaſed (a late Appellant), *John Hopkinſon*, and *George Nidd*, } Appellants.

His Majeſty's Attorney, the Reverend *John Blair*, Doctor of Laws, Rector of *Burton Coggles*, in the County of *Lincoln*, and the Right Reverend *John* Lord Biſhop of *Lincoln*, } Reſpondents.

The Caſe of the Appellant †.

THE ſaid *John Cholmeley*, *John Hopkinſon*, and *George Nidd*, being adviſed, that the laſt mentioned decree is erroneous, the appellants humbly hope, that the ſaid decree of 17th *June*, 1765, [which ſee under *Trinity* Term, 5 *Geo.* III,] ſhall be reverſed, and the ſaid information be wholly diſmiſſed, for the following, among other

---

* The original appeal afterwards abating by the death of the ſaid *John Cholmeley*, Eſq; defendant in the ſaid ſuit in *Chancery*, adminiſtration with the will annexed, was, ſome ſhort time ſince, granted to *Mountague Cholmeley*, Eſq; (the only ſon and heir of the ſaid *John Cholmeley*. Eſq;) who revived the ſaid appeal, by virtue of an order of the Houſe of Lords, dated 2d *March*, 1768.

† See the caſe under *Trinity* Term, 5 *Geo.* III.

REASONS:

REASONS:

1*ſt*, By the common law, the parſon, patron, and ordinary might alienate the poſſeſſions of the church; and though the ſtatute of the 13th of Queen *Elizabeth*, to prevent the impoveriſhment of ſucceeding incumbents, hath reſtrained his power; yet both the court of *Chancery* and *Exchequer* have underſtood and expounded the act by a maxim of common law, that *eccleſia meliorari non deteriorari poteſt*, and have been of opinion, that the legiſlature did not intend to prevent exchanges or bargains, by which ſucceeding incumbents might be benefited; for there are ſtill remaining upon the records of both courts many inſtances, both before and after the decree in queſtion, of decrees eſtabliſhing the like agreement againſt the ſeveral lay parties, their heirs, executors, and adminiſtrators, and againſt the incumbents and their ſucceſſors (as this caſe is), none of which, before the preſent, were ever impeached by ſubſequent decrees of a court of equity; and this practice continued, until, by the frequency of parliament, it became more convenient to have ſuch agreements eſtabliſhed by the legiſlature. This practice cannot be accounted for, unleſs the great perſons, who ſat in both courts, had, upon the conſtruction of the act of parliament, been of opinion, that it was not contrary to law, to eſtabliſh ſuch an agreement upon pregnant proof made, that it was for the benefit of the church; and to give the act of Queen *Elizabeth* at this time a different expoſition, will not only contradict the opinions and acts of the judges of both courts, but, in this caſe, diſturb an uninterrupted quiet enjoyment of lands and tithes for a century and upwards, and may have the like effect upon other parts of the kingdom.

Stat. 13 *Eliz.* chap. 10

2*dly*, That the agreement in queſtion was beneficial to the church, cannot be doubted, when the incumbent and the Biſhop both ſubſcribe to the propriety of it in their anſwers; and the reſpondents have not now made any proof that it was otherwiſe.

3*dly*, However the queſtion might be conſidered at law, yet in equity no agreement ought to be reſcinded, without reſtoring the parties to their former condition: It ought to be reſcinded in the whole, or not at all. By this decree, this agreement is reſcinded in part, to the prejudice of the appellant Mr. *Cholmeley*, to the amount of twenty-nine acres of land; for the decree, though it compels the appellants to account for their tithes in kind, leaves the reſpondent *Blair* the benefit of the ſtatute of limitations, to protect him in the poſſeſſion of twenty-nine acres more than his ancient glebe, amounted to. He that would have the aſſiſtance of a court of equity, muſt do equity; and therefore the reſpondent ought not to have a decree for tithes in kind, but upon the terms of his yielding up the poſſeſſion of the ſurplus glebe lands.

4*thly*, An account is decreed of the tithes in *ſpecie*, notwithſtanding the record in the *King's Bench* is an evidence of ſome weight, that the ancient mode of tithing in the pariſh before the decree of 1677, was according to the cuſtoms ſtated in that record; and therefore if the record is not to be taken as a deciſive proof of the cuſtoms, yet it is a forcible ground for directing an inquiry touching ſuch cuſtoms; for if it is barely probable, that all tithes were not payable in kind, it is unjuſt to decree it abſolutely without inquiry.

5*thly*,

5*thly* The decree in this cauſe is directly oppoſite to an inrolled decree of the ſame court, inſiſted upon by the appellants; which inrolled decree is by law binding and concluſive upon the perſons named in it, until reverſed by a ſuperior judicature; and the reſpondent, being a ſucceſſor in the rectory, is named in the decree as a perſon bound by it.

The Caſe of the Reſpondent *.

In the month of *November*, A. D. 1767, the appellants preſented their appeal from the ſaid decree to their Lordſhips, praying, that the ſame might be reverſed.

But the reſpondent, his Majeſty's attorney general, in behalf his Majeſty, and the reſpondent *John Blair*, humbly inſiſted, that the decree is juſt, and agreeable to the rules of equity, for the following, among other,

REASONS:

1*ſt*, The agreement of 1664, which is the original foundation of the appellants claim of exemption from the payment of tithes in kind, was confeſſedly entered into between the then owners of the lands within the pariſh, and the then rector only, therefore it could not bind any future incumbent of the rectory, as neither the patron or ordinary were parties to it; and the agreement, upon the face of it, appears to have been founded either in fraud, miſtake, or colluſion; for it recites, that the glebe belonging to the rectory did not exceed eighty-

* See the caſe of the plaintiff under *Trinity* Term, 5 *Geo.* III.

four acres, though, by the reſpondents evidence it appears, that the glebe did then conſiſt of above one hundred and two acres, beſides a very extenſive and valuable right of common; the reſpondents allotment therefore of one hundred and thirteen acres, was ſcarcely an equal exchange for the glebe and the right of common enjoyed by the rector before the agreement; therefore it is inſiſted, that, as to the agreement, it is void, as againſt the reſpondents, either from the nature of it, as not being entered into by the proper and neceſſary parties; or ſuppoſing it to be in that reſpect effectual, it muſt neceſſarily fail, as not being a fair and *bona fide* agreement, the compenſation made by it to the rector, in lieu of his glebe and rectorial rights, not being juſt or adequate.

2dly, The decree of 1677, confirming the agreement, with the variation as to the ſums to be paid by each of the eſtates in lieu of tithes, meets with the ſame forcible objection in reſpect of the want of proper parties to the ſuit in which it was made, it being provided by the common law, that no right of the church ſhould at any time be alienated, without the conſent of all parties, who could be in any ſort intereſted in them, *viz.* the parſon, patron, and ordinary: In this caſe the rectorial rights were all alienated and given up, and the patron (whoſe particular right, *in* reſpect of the value of the rectory, was materially affected by it) was no party, either to the agreement in the firſt inſtance, or to the decree by which the appellants contended, that the agreement was confirmed, and his right moſt eſſentially prejudiced: But this eſſential defect is greatly increaſed in the preſent caſe, when it is obſerved, that the patron is in the King, whoſe right can never be legally taken away by colluſion; and to this it may be added, that

that even a decree can add no ſtrength to this illegal tranſaction, as it is particularly provided againſt by the 13th of *Elizabeth*, chap. 9. § 8. where it is declared, that all judgments hereafter to be had for the intent to have or enjoy any leaſe contrary to the ſaid ſtatute, or any of them, ſhall be deemed void, in ſuch ſort as bonds and covenants are appointed to be void, which are made for that purpoſe; for by the 14th of *Elizabeth*, chap. 11. all bonds, contracts, promiſes, and covenants, are declared to be of the ſame nature, to all intents and purpoſes, as leaſes, many evil-diſpoſed perſons having (as it is there cited) defeated the true meaning of the ſtatute of the 13th *Elizabeth*, chap. 20. by aſſerting, that bonds and covenants were not in law taken to be leaſes.

13 *Eliz.* chap. 9. § 8.

14 *Eliz.* chap. 11.

13 *Eliz.* chap. 20.

Appellant's Objections anſwered.

1ſt, It was inſiſted, that the defendant Dr. *Blair*, ought not to have been permitted to ſet up his demand after an acquieſcence by the crown as patron, and by the ſeveral rectors who have held the rectory ever ſince the making of the agreement and decree; and particularly after an acquieſcence by the reſpondent *Blair* himſelf, from the end of the year 1756, when he was preſented to the rectory, to the beginning of the year 1762, when the information was filed.

Anſwer. Acquieſcence cannot be urged as an objection to the crown; and therefore, as the right of the crown in quality of patron of this rectory, will be materially prejudiced, if the decree of 1677 is to be conſidered as a bar to the reſpondent *Blair*'s claim of tithes in kind, it may perhaps be unneceſſary to give any anſwer, as to the acquieſcence imputed to

the reſpondent *Blair*, and his ſeveral predeceſſors: But this objection, if admitted in its full force, will have but little weight when it is underſtood, that Mr. *Adamſon*, the rector, who was party to the decree of 1677, and conſequently bound by it, lived in the enjoyment of the rectory to the year 1718. Mr. *Dongworth* who ſucceeded him, held it four years, only to the year 1722, and Mr. *Nicholſon*, the next ſucceeding rector, enjoyed it from 1722, to 1728, only a ſpace of ſix years. Dr. *White Kennet* held it from 1728 to 1740, and Dr. *Salter* from 1740 to 1756; ſo that the reſpondent Dr. *Blair*, who cannot be conſidered as claiming under any of the former rectors, is anſwerable for his own acquieſcence, which was for a very ſhort time, conſidering the difficulties he had to encounter in obtaining a thorough knowledge of the foundation of the appellants claim of exemption, againſt the united efforts of the whole pariſh, whoſe intereſt it very evidently appears to have been, to prevent the reſpondent from acquiring that knowledge.

1*ſt*. The appellant contended, that the agreement cannot be reſcinded in part, if not *in toto*.

Anſwer. It is true, that it is now impoſſible to reſtore the reſpondent Dr. *Blair* to the poſſeſſion of all thoſe rights which were enjoyed by the rector before the agreement was entered into, and therefore it was that the reſpondents by their information itſelf waved any relief, in reſpect of the glebe; but it is ſubmitted, that the impoſſibility of doing the reſpondent complete juſtice can never be urged as a reaſon, why as much juſtice ſhould not be done them as the preſent ſtate of things will admit; and as that part of the agreement which regards the tithes, is totally diſtinct

diſtinct matter from that part of it relating to the glebe, the reſpondents may have the relief given them by the decree now appealed from, without diſturbing or in the leaſt interfering with the other part of the agreement reſpecting the glebe.

3*dly*. The laſt head of objection, made by the appellants, to the relief given to the reſpondents, by the decree appealed from, is the prohibition iſſued from the court of *King's Bench*, in the *third* of *James* the *firſt*, by which the appellants contend, that it appears the rector is not intitled to all manner of tithes in kind, but only to ſuch titheable matters as are mentioned in the prohibition.

This objection will receive a full anſwer when it is conſidered, that no final judgment was ever pronounced in the ſuit in which the prohibition iſſued, and conſequently the writ of prohibition itſelf can never be ſet up as a bar to the reſpondents claim, of what is due by common right, and the defence ariſing under the prohibition, is inconſiſtent with the recitals in the agreement, upon which they rely, as the foundation of their claim of exception. Anſwer.

For theſe and other reaſons, the reſpondents humbly hope that the decree ſhall be affirmed, and the appeal diſmiſſed without coſts.

November 21ſt, 1768.

Ordered and adjudged, that the appeal be diſmiſſed this Houſe, and the decree therein complained of, be hereby affirmed. Judgment of the Houſe. MSS.

See the original cauſe and decree under *Trinity* Term, 5 Geo. III.

Michaelmas Term, 9 Geo. III.

A. D. 1768.

In the *Exchequer*.

Erſkine againſt *Ruſſle*.

Not neceſſary to cut down barley or oats before tithe ſet out; and whether tithe ſet out before reaſonable quantity of corn was cut down, muſt always depend upon the circumſtances of each particular caſe, 5 *Bac.* Abr. 74.

THE queſtion was, whether all the wheat growing in a field muſt be cut down, before the tithe of any part of the wheat muſt be ſet out? The caſe of *Mather* againſt *Holmwood* [which ſee under *Michaelmas* Term, 5 *Geo.* III.] was cited, and relied upon by the counſel for the plaintiff, as a determination in point.

Mr. *Huſſey* was remarked for delicacy and candour.

The late Mr. *Huſſey*, after opening for the defendant, obſerved, that the queſtion was not, according to his recollection, much argued in the caſe of *Mather* againſt *Holmwood*; for that ſome circumſtances of fraud appearing in that caſe, he, who was of counſel with the defendant, commended it to his client, to ſubmit to a decree, for accounting for the tithe in queſtion, without coſts. Having obſerved this, he with that delicacy and candour, for which he was moſt remarkably diſtinguiſhed, begged to be informed by the court, whether he was precluded by any thing which fell from the court, in *Mather* againſt *Holmwood*, from arguing the queſtion in the preſent caſe. Hereupon *Parker*, chief baron, ſaid, that

L. C. B. *Parker* eminent for greatneſs of mind and goodneſs of heart.

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* See "the *Nomenclature* of *Weſtminſter-hall*," ſubjoined to the Biographical Hiſtory of Sir *William Blackſtone*, octavo edit. 1782. *J. R.*

it

it was the deſire of the court to have the queſtion, it being a queſtion of the utmoſt importance, fully argued; and, which ſhewed true greatneſs of mind, as well as goodneſs of heart, he added, that, for his own part, he ſhould be glad to reconſider the queſtion, in order to have an opportunity, in caſe he ſhould ſee reaſon for it, of departing from the opinion he had for ſome time entertained. After hearing the queſtion fully argued, and taking time to conſider, the opinion of the court was, that it is not neceſſary to cut down all the wheat growing in a field, before the tithe of any part of the wheat is ſet out; and that the tithe may be ſet out, as often as a reaſonable quantity of the corn growing in a field is cut down.

Another queſtion in this caſe was, whether all the barley or oats growing in a field muſt be cut down, before the tithe of any part of the barley or oats can be ſet out? The opinion of the court was, that it is not neceſſaay to cut down all the barley or oats growing in a field, before the tithe of any part can be ſet out, and that the tithe may be ſet out as often as a reaſonable quantity of the corn growing in a field is cut down. The court did not aſcertain what is a reaſonable quantity of corn to be cut down, before any tithe is ſet out; ſo far from doing this, it was ſaid, that it could not be done; inaſmuch as it muſt always depend upon the circumſtances of the particular caſe, whether the tithe was ſet out before a reaſonable quantity of corn was cut down.

The opinion of the court, upon good conſideration, was, that unleſs there be a cuſtom of the pa-

Every tenth cock of barley muſt be ſet out for tithe, unleſs a cuſtom to the contrary. 5 *Bac.* Abr. 75.

riſh

riſh to ſet the tithe of barley out in ſome other manner, the barley muſt be gathered into cocks, and every tenth cock muſt be ſet out for tithe.

In the *Exchequer.*

Cecil Willis, D. D. vicar of *Holbeach*, in the county of *Lincoln*, } Plaintiff,

—— *Harvey*, and others, Defendants.

Taken from a quarto pamphlet, intituled, "*The Nature of Agiſtment Tithe of Unprofitable Stock,*" *illuſtrated in the caſe of the vicar of* Holbeach, *edit.* 1778.

Agiſtment tithe of ſummer eaten ground, by unprofitable cattle, eſtabliſhed.

PLAINTIFF was vicar of the very extenſive and rich grazing pariſh of *Holbeach*, in the county of *Lincoln*; in which the revenue, like other vicarages, ariſes out of what is commonly (though erroneouſly) called the ſmall tithes, amounting annually to a ſmall ſum, very inadequate to the extenſiveneſs and fruitfulneſs of the pariſh.

This bill was filed by him againſt the defendant, and others, in order to ſtrike out a tithe (*intirely new* to the pariſhioners, as they acknowledged in their anſwer to the bill) for the ſummer eaten ground, which would be in ſome meaſure proportionate to the impropriator's tithe of corn and hay, *&c.*

By the endowment of *Holbeach*, the Biſhop of *Lincoln* is intitled to the tithe of corn, hay, wool, lamb,

lamb, and flax, *duntaxat*; *cætera quæcunque quandocunque quotiescunque accidunt, pertineant ad portionem vicarii.*

Upon theſe general words, *cætera quæcunq*; &c. the plaintiff grounded his claim of agiſtment tithe for all unprofitable ſtock; which cauſe was heard and determined in the court of *Exchequer*, *Michaelmas* Term, 1768.

Minutes of the decree.

*** PARSON * BATEMAN † *obſerves, that theſe minutes are of ſuch high authority, and, beſides giving the beſt ſanction to the rule, by which to value the tithe of agiſtment, ſtate the ſubject in the fulleſt and cleareſt light. He therefore deemed them a moſt valuable acquiſition, and their inſertion indiſpenſible.*

Agiſtment tithe, and mode of payment.

By the court of *Exchequer*.

"Agiſtment tithes are ſuch as are due upon the paſturage of unprofitable cattle; and unprofitable cattle are ſuch as having neither been brought to the plough, nor to the pail, yield no titheable produce. To theſe may be added ſheep from the time

Agiſtment tithes, what.

Unprofitable cattle, what.

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* The biographer of Sir *William Blackſtone* informs us, that that lawyer declares the appellation of *parſon* (however depreciated it may be, by familiar, clowniſh, and indiſcriminate uſe) is the moſt legal, moſt beneficial, and moſt honourable title a pariſh prieſt can enjoy. See Biographical Hiſtory of Sir *William Blackſtone*, 8vo. edit. 1782. p. 52. n. *J. R.*

† In his "treatiſe on agiſtment tithe," chap. V. p. 25. *J. R.*

they

they are born, to the time they are ſold to the butcher, or otherwiſe diſpoſed of."

The legal and equitable mode of paying agiſtment tithes.

"What is moſt material to the clergy in the preſent caſe, is, the mode of paying theſe tithes. Dean *Watſon*, and, if we miſtake not, *Gibſon* and *Burn*, and other writers of eccleſiaſtical law, have propounded, that the tenth of the total, or of the improved value, ſhall be paid to the parſon; that is, if an ox bred by the farmer, and never uſed in the plough, is brought to the market, the tithe for what he is ſold for, ſhall be paid; but if he has been bought at a certain age, and afterwards ſold, the tenth of the improved value ſhall be paid."

Tithes of produce of earth conſumed, while cattle are kept in unprofitable ſtate, is the agiſtment tithe due.

"This was a vague and uncertain method, and in fact not founded on any legal principles; for it is not the tithe of the value of the cattle, which might be more or leſs, according to the ſkill or ignorance, the good or ill fortune of the farmer, which is due *de jure* to the parſon; it is the tithe of the produce of the earth conſumed during the time ſuch cattle are kept in an unprofitable ſtate, that is primarily and *ab origine* due."

Tenth of the produce conſumed by the animal, to be paid for agiſtment tithe.

"This then muſt be the mode of payment; a farmer breeds an ox, and at three years old ſells him to a grazier for ſeven pounds; according to the above mentioned authorities, the parſon would be intitled to fourteen ſhillings; but it ſhall appear that he is not, for, upon the ſame principle, he would be intituled to a tenth part of the carcaſe, had the farmer killed him; whereas he could have no ſuch right, his claim being founded excluſively on the

tenth

tenth of the produce consumed by the animal; he must therefore be paid thus:

What is the price of keeping the { 1st. / 2d. / 3d. } year,

Keeping	Tithes.
1 00 0	0 2 0
1 15 0	0 3 6
2 05 0	0 4 6
5 00 0	0 10 0

"When the ox is in the hands of the grazier, a second tithe arises, probably to another parson in another parish; he keeps him twenty weeks, and then sells him to the butcher for ten guineas; the improved value is three pounds ten shillings, but the parson shall not be intitled to seven shillings for his agistment tithe; for then he would avail himself of the skill, address, and judgment of the grazier, who, for ought he knows, may have over-reached the butcher, and sold the animal for more than he will yield; *it is the tenth of the price of keeping him twenty weeks, that he may claim*, which amounting to forty shillings, leaves him four; and so it is with respect to colts, and other animals coming under this denomination; and this is the legal and equitable mode of payment."

It is the tenth of the price of keeping the animal that parson may claim for agistment tithe.

Abstract of decree from WILLIS *on the nature of agistment tithe, &c. p. 15.*

"The court declared, that the plaintiff, as vicar, hath, by virtue of the endowment, been from the time of his induction, and still is, intitled to the tithe of the agistment of all sheep kept and depastured on the lands in the parish of *Holbeach*, from the time the same were last sheared, until they were sold off fat, or taken out of the said parish for sale, or for some

Substance of the decree.

ſome other purpoſe, before the next ſhearing time; and therefore the court did decree, that all the defendants, the occupiers, ſhould account for ſuch ſheep agiſtment tithe, and alſo all other agiſtment tithe for unprofitable cattle (with coſts) for the whole time ſince the ſaid vicar's induction (nineteen years) *&c. &c.*"

Michaelmas Term, 11 Geo. III.

December 13, A. D. 1770.

In the *Exchequer*.

Francis Yateman, —— Plaintiff.

Sarah Cox, *Elizabeth Lane*, widow, *Phanuel Bacon*, D. D. and *Jonathan Martin*, } Defendants.

*** *The plaintiff's caſe as ſtated in his own pleadings, extracted from the printed caſes of appeal, delivered to the Lords, counſel, and parties concerned, previous to the hearing, with the manuſcript judgments of the Houſe, indorſed thereon.*

The church of *Dorcheſter* founded.

THE church of *Dorcheſter*, *Oxon*, is a very ancient church, founded in the earlieſt ages of Chriſtianity in *England*, and the mother church of it's peculiar, and as ſuch, the rectory or ſpiritual profits of ſuch peculiar belonged thereto, as, it is preſumed, of original right; in which peculiar are the towns of *Dorcheſter*, *Benſon*, *Warborough*, *Stadham*, *Chiſlehampton*, *Drayton*, *Cliſton*, *Beriot*, *Overy*, *Nettlebed*, and *Baldon*, or *Baldington*, under

under which general name of *Baldon* or *Baldington* are comprehended and known the townſhip of *Toot Baldon*, *Marſh Baldon*, *Saint Lawrence Baldon*, and *Little Baldon*, and every of them, all lying within the boundary of *Baldon-field*, but neither of them of itſelf known by the name of *Baldon* without other addition; and all the *Baldons* keep the ſame feſtival, being that of *Saint Lawrence*.

Spiritual profits of its peculiar to whom belonging.

The church of *Dorcheſter*, with the ſpiritual profits of it's peculiar, was anciently parcel of the poſſeſſions of the Biſhop and convent of *Dorcheſter*, and after the removal of the ſee to *Lincoln*, ſuch ſpiritual poſſeſſions remained the property of it's chapter, conſiſting of ſecular canons, with an abbot preſiding over them, inſtead of the biſhop.

Before 1291, rectory of *Shirburn* appropriated to the uſe of the monaſtery of *Dorcheſter*.

Beſides the rectory or ſpiritual revenues of the peculiar, it appears, that the ſaid monaſtery, before the year 1291, had the rectory of the church of *Shirburn*, another ancient mother church within the ſame county, appropriated to it's uſe, but thoſe of the peculiar, it is conceived, belonged to it, from the earlieſt payment of tithes; it appears alſo, to have had ſundry temporal eſtates; and there is great ground to conclude, that the abbot had an houſe at *Shirburn*, and often retired thereto, and was there at the time of the ſurvey of the poſſeſſions of the monaſtery of *Dorcheſter*, 26 *Hen.* VIII.

Dorcheſter church in the deanery of *Cuddeſden*, but *Shirburn* in that of *Aſton*.

Dorcheſter church, and the whole of it's peculiar, is in the deanery of *Cuddeſden*, but *Shirburn* in the deanery of *Aſton*; and whether through the hurry and confuſion of thoſe times, or the inaccuracy of the ſurvey of 26 *Hen.* VIII. all the poſſeſſions of *Dorcheſter* are returned therein, as being in *Aſton* deanery, although

although *Dorcheſter* church, and the whole of it's peculiar, is in the deanery of *Cuddeſden*, and rated amongſt other churches, having ſpiritualties in the deanery of *Cuddeſden*, in the year 1291, but no ſuch church as *Marſh Baldon*, having any ſpiritual endowment, is to be met with in the taxation of ſpiritualities, in the year 1291.

The peculiar or ancient church of *Dorcheſter* being very extenſive, and many villages or hamlets within it, remote from the mother church, occaſioned the erection of many chapels within it's peculiar rectory, ſubſequent to the diviſion of the dioceſs into parochial cures, and the eſtabliſhment of tithes in this kingdom, ſome of which chapels were independent chapels, endowed with a temporal revenue in perpetuity by ſome pious perſons for maintenance of a prieſt to perform divine ſervice; and for the better accommodation of the inhabitants, were allowed the privilege of ſacraments and burials, and other parochial rights, and preſentation being made of ſome of them, by their founder or endower, became from that time preſentative, and inſtitution the mode of inveſting it's incumbents with ſuch temporal revenues wherewith endowed; and to enable them to recover and defend the ſame was practiſed and allowed; others have no ſuch proviſions, yet moſt of them, either through the preſentation of their patron, or vulgar reputation, have now acquired the reputation of pariſh churches, and the hamlets wherein ſituated diſtinct pariſhes, although anciently parcel of *Dorcheſter*, and no tithes belonging of original right to any of them, except *Dorcheſter*.

Monaſtery diſſolved.

The convent of *Dorcheſter* being diſſolved in the reign of King *Henry* the *Eighth*, the crown, for valuable

luable conſiderations paid into the *Exchequer*, granted it's ſpiritual revenues out in parcels to ſundry purchaſers by ſuch deſcriptions as appeared beſt adapted to aſcertain the matters granted; and this, according to the language of ſuch grants, was by the deſcription of the rectory of ſuch place, &c. whereof the grant was of the ſpiritual profits of tithes; amongſt others, one *Toppes* in 28 *Hen.* VIII. had a grant of all tithes, and glebe lands of all the *Baldons*, parcel of the peculiar rectory of *Dorcheſter*, by the deſcription of the rectory of *Baldon*, parcel of the poſſeſſions of the monaſtery of *Dorcheſter*; and in the eighth year of Queen *Elizabeth*, the crown, in conſideration of eleven hundred and fifty-two pounds paid into the *Exchequer*, granted *ex certâ ſcientiâ*, the reverſion of ſuch rectory of *Baldon* generally (parcel as aforeſaid) to one *Hall* in fee, excepting the advowſon of all rectories, vicarages, and churches.

Rectory of *Baldon*, parcel of it's poſſeſſions, granted to *Toppes* for life.

The reverſion in fee granted to one *Hall*.

In the eighth year of Queen *Elizabeth*, *Hall* granted the ſaid rectory of *Baldon* to one *Anthony Pollard*, an anceſtor of the defendant *Lane*, in fee, from whom it deſcended to *John Pollard*, and afterwards to *Lewis Pollard*, great grand-father of the defendant *Lane*, and *Margaret*, late wife of defendant *Bacon*.

Rectory of *Baldon* granted by *Hall* to *Anthony Pollard* in fee.

In the ſixth year of King *James* the *Firſt*, the crown granted licence to *John Pollard*, and *Lewis Pollard*, to alien the rectories of *Marſh Baldon*, *Saint Lawrence Baldon*, and *Little Baldon*, to *Richard Goddard*, and *John Staunton*, but for what purpoſe or eſtate doth not appear.

In the fourteenth year of King *James* the *Firſt*, ſaid *Lewis Pollard* demiſed to one *Allen* for ninety-

Said rectory, &c. except as therein excepted, granted to one *Allen*, 14 *Jac.* 1.

nine years (if three *perſons* therein named ſhould ſo long live) all that the rectory or rectories, parſonage or parſonages, of *Toot Baldon*, *Saint Lawrence Baldon*, and *Marſh Baldon*, and every of them, excepting all the tithes of *Little Baldon*, of one yard land, called *Shurles*, and ſuch tithes and tenths, as *one Robinſon, clerk, the then incumbent of the church of Marſh Baldon, had enjoyed by the ſpace of twenty years, then paſt*; and alſo levied a fine thereof to *William Davis* and *William Lader*, by the names of the rectories of *Toot Baldon*, *Saint Lawrence Baldon*, and *Marſh Baldon*.

Robinſon, who was preſented to the pariſh church of *Marſh Baldon*, in the year 1562, dies.

Sometime in or about the year 1618, *Robinſon*, or *Roberts*, died, having been incumbent of the church of *Marſh Baldon* from the year 1562, being preſented to the pariſh church of *Marſh Baldon* (but not to the rectory) in ſaid year 1562; on his deceaſe one *Humphreys* is preſented, in the year 1619, by *Ann Roberts* and *Auguſtin Roberts*, but not in the ſtile *Roberts* had been preſented, which was to the pariſh church only; but *now* the preſentation is to the rectory and pariſh church of *Marſh Baldon*; and in the year 1620, King *James* preſents ſame *Humphreys* to the ſaid rectory of *Marſh Baldon*, ſolely as a lapſe.

Pollard to *Jenners* except as in *Allen*'s demiſe.

In the ſecond year of King *Charles* the *Firſt* (being nine years after) ſaid *Lewis Pollard* granted, in fee, to one *James Jenners*, all that the rectory and parſonage of *Baldon*, alias *Toot Baldon*, *Marſh Baldon*, and *Saint Lawrence Baldon*, excepting as in ſaid demiſe to *Allen*, all tithes of *Little Baldon*, of ſaid yard-land called *Shurles*, and ſuch tithes as the ſaid *Robinſon* had enjoyed for twenty-nine years then paſt, and levied a fine of the ſaid rectories, by the

name

name of the rectories of *Test Baldon*, *Marſh Baldon*, and *Baldon Saint Lawrence*.

In 2 *Car.* I. a writ of *diſtringas* iſſued to diſtrain the tenants of the ſaid rectory, who returned, that *James Jenners* then held ſaid rectory, who on the 9th *October*, in *Michaelmas* Term, appeared, and alledged, that king *James*, by letters patent dated 10th *November*, in the eleventh year of his reign, granted licence to *Lewis Pollard (inter alia)* to alien the rectories and churches of *Marſh Baldon* and *Saint Lawrence Baldon*, with all glebe lands, tithes, &c. and on 5th *November*, in ſaid term, *Lewis Pollard* appeared in perſon and ſaid, that he was ſeiſed in fee ſimple or fee tail, and by indenture of 15th *November*, 11 *Jac.* I. conveyed to *Thomas Goddard* and *John Gardner*, and their heirs *(inter alia)* all ſaid rectories, and alledges, that the rectories of *Marſh Baldon*, and *Saint Lawrence Baldon*, and the aforeſaid rectory of *Baldon*, mentioned in the ſaid letters patent, were one and the ſame, and not different, and thereupon was diſmiſſed the Court.

Writ of *diſtringas* iſſued.

In the year 1649, *Jennens* and one *Fiennes*, with *John Pollard*, ſon and heir of *Lewis Pollard*, then the huſband of *Suſan*, daughter and ſole heir of *John Danvers*, and, in her right, lord of the manor of *Marſh Baldon*, by mutual deeds of exchange, exchanged all the tithes of certain lands mentioned in a ſchedule annexed to one of ſuch deeds of exchange, for all tithes of lands mentioned in a ſchedule annexed to the other of ſuch deeds, &c. (*inter alia*) all tithes, tenths, oblations, obventions, &c. of *Hatchet Piece*, conſiſting of twelve acres, of one cloſe called *Hanging Lands* of twenty-eight acres, and ſix acres in *Short Monkhill*, thentofore parcel of *Little Baldon*, were

Tithes, &c. exchanged *(inter alia)* in 1649.

All tithes, &c. of *Hatchet hanging lands*, and *Short Monkhill*.

paſſed to *Jennens* on ſuch exchange, in lieu of all tithes of other lands, now parcel of *Little Baldon* farm.

On the deceaſe of *James Jennens*, the rectory (excepting as above) deſcended to *Richard* his ſon, and afterwards came to *William Jennens* his grandſon, who ſold and conveyed it to one *Sayer*, and in the year 1711, by order of a decree in *Chancery*, ſame was conveyed to Mr. *Yateman*'s grandfather. He died in 1712, on whoſe deceaſe it deſcended to the plaintiff's father, a minor at ſchool.

In 1752 plaintiff's father died.

In 1752 plaintiff's father died, by which the rectory deſcended to the plaintiff; but before the deceaſe of his father, ſo far as the plaintiff can form notions by words paſſed from him, the defendants *Lane* and *Bacon*, or their tenants, had withheld ſundry little matters of tithes whereto his tenants were intitled; but their value being inconſiderable, and not then diſcovered as leading to greater incroachments, the complaints of the tenants of the rectory were conſidered as matters not ſufficient to anſwer a ſuit. Encouraged by ſuch forbearance, the defendant Dr. *Bacon* forms a larger plan of depriving the impropriator of all his hay tithes, ariſing from *Marſh Baldon* lands, in oppoſition to conſtant enjoyment; and to this end, *orders one* William Cox, *who rented of him, as well thoſe tithes, which were excepted for the uſe of* Robinſon, *as a piece of ground conſiſting of fifteen acres, called* Smith's *Piece, common field lands of Mrs.* Lane, *his ſiſter-in-law*, whereof the plaintiff hath only two thirds of the tithes, and the miniſter of the church of *Marſh Baldon*, the other one third, or a compoſition in lieu of ſuch one third, either in reſpect of five acres thereof being parcel of thoſe lands from whence

Dr. *Bacon* attempts to deprive the impropriator of hay tithes.

whence the excepted tithes aroſe, or one third of the tithes thereof granted to *Robinſon*, and therefore excepted; lays down ſuch piece into meadow, and being in cock, the plaintiff's tenant or his ſervant tithed the ſame in the proportion the corn had paid; as he had hay before off another piece in the occupation of Mrs. *Lane* herſelf, paying the like proportion of tithes; thus the plaintiff was of neceſſity forced into a ſuit in equity.

Beſides theſe tithes, Mrs. *Lane* having laid down a ſmall parcel of land, heretofore parcel of *Hatchet Piece*, but now mounded off, and ſince called *Hatchet Cloſe*, parcel of the lands whereof all tithes were exchanged in 1649; and ſaid Dr. *Bacon* having ordered one *Martin* his tenant to refuſe payment of the privy tithes of *Hanging Lands*, held by the leaſe of *Queen's College*, *Oxon*, other parcel of ſuch exchanged tithes, under pretence, that only the corn tithes of the former were exchanged, and only predial tithes of the latter, and not all tithes thereof; and therefore that all not exchanged belonged to Mrs. *Lane*, as heir of *John Pollard*, ſon of *Lewis Pollard*, as unconveyed on ſaid exchange, or to Dr. *Bacon* her brother-in-law, under his general right, as rector of the pariſh of *Marſh Baldon*, although under ſaid *Lewis Pollard*'s exception, claims the tithes of ſundry of her *Marſh Baldon* lands, in reſpect of her being heir of the ſaid *Lewis Pollard*; and their being parcel of *Little Baldon* farm, at the time of *Lewis Pollard*'s grant of ſaid rectory of *Baldon* to *Jennens*, and reſervation made; Dr. *Bacon* having alſo in the year mentioned in the bill reſerved the furze of many lands of his farm in *Toot Baldon*, let to one *Fruen*, and diſpoſed thereof to Mrs. *Lane*; after being ſtacked upon Mrs. *Lane*'s land two years or more,

ſame is burnt, and an allowance refuſed; but ſome lime, ſome time after filing the bill, being laid on Mrs. *Lane*'s land, paying only two thirds, and this was urged as a proper application to exempt ſuch furze lands of Dr. *Bacon*'s in *Teſt Baldon*, let to a tenant, from furze tithes.

Beſides theſe matters, Mrs. *Lane* and Dr. *Bacon*, and their tenants by their directions, have of late withholden many other titheable matters, with a view of driving the plaintiff to his remedy for recovery, and particularly the hay tithes of ſeveral homecloſes, ſeldom mowed, parcel of farms known by the name of *Battins*, *Hayſeys*, *Burnthouſe Cloſe*, and *Tutty*'s, whereof no refuſal before of hay tithes on other part of ſuch holdings, but on the contrary, yearly paying ſuch *ſpecies* of tithes without denial to Mr. *Yateman*; and all cloſes, parcel of ſuch holdings, whenever mowed had to that time yielded their hay tithes to the parſon under whom the plaintiff claims the ſaid rectory of *Baldon*, although the miniſters of the church of *Marſh Baldon* more uſually had the privy tithes thereof

Plaintiff compelled to file a bill.

At length Mr. *Yateman* was compelled to file his bill as owner of the impropriate rectory of *Baldon*, ſetting forth, that a chapel was many years ſince, though long after the eſtabliſhing of tithes, founded in the townſhip of *Marſh Baldon* by ſome lord of that manor; and that the ſame for many years within memory had been preſented to, by the name of a chapel, and that the ſame had been endowed with lands in perpetuity, by ſome lord of the manor of *Marſh Baldon*, for the maintenance of a prieſt, and by means thereof its advowſon belonged to them, but that the rectory or ſpiritual profits of *Marſh Baldon*,

don, is parcel of the rectory of *Baldon*, and that he was ſeiſed thereof, except ſuch parts as *Lewis Pollard*, great grandfather of defendant *Lane* had excepted thereout, in his grant to *Jennens*.

To which bill the defendants ſeverally put in their anſwers, alledging, that in *Baldon* there were two ancient pariſh churches, and that each of ſuch churches had a rectory, or the ſpiritual profits of the place appendant to it; and that the church of *Marſh Baldon* was a primitive mother church, and not ſubject to any other church, as its mother church; and that the preſentation thereto from time to time IMMEMORIAL ever had been to the *rectory and pariſh church* of *Marſh Baldon*; and that the advowſon thereof belonged to Mrs. *Lane*, as lady of the manor of *Marſh Baldon*; and that ſhe ſeveral years ſince preſented the ſaid Dr. *Bacon* thereto, and that he had inſtitution and induction into the ſame, and was rector of the pariſh and pariſh church of *Marſh Baldon*, and as ſuch, of common right intitled to all tithes thereof, not conſtantly enjoyed by the plaintiff and thoſe under whom he claims; but admitting Mr. *Yateman* duly ſeiſed of the rectory of *Baldon*, which they alledged was only the rectory of *Toot Baldon*, and not of the whole of *Baldon*, or all the *Baldons*, in that *Marſh Baldon* was a diſtinct rectory, and ever belonged to the pariſh church of *Marſh Baldon*, and never appropriated to the monaſtery of *Dorcheſter*; but admitted either by appropriation, or under ſome other right, granted part of the tithes of *Marſh Baldon* belonged to ſaid monaſtery of *Dorcheſter*, and as ſuch might paſs by ſome general words in the grants of the crown, under the deſcription of the rectory of *Baldon*, and that under ſuch appropriated

Defendants put in anſwers to it.

Admit the plaintiff ſeiſed of the rectory of *Baldon*, and that the greateſt part of the tithes of *Marſh Baldon* belonged to it.

right, though not of common right, Mr. *Yateman* might be well intitled thereto,

Matters hereupon being at iſſue, with a view, as it is conceived, to extort ſome inadvertent admiſſion from Mr. *Yateman*, or delay an hearing, Mrs. *Lane* and Dr. *Bacon* filed their croſs bill againſt Mr. *Yateman*, ſetting forth, that there were ſundry *moduſes* between defendants, and that the church of *Marſh Baldon* was a primitive mother church, not ſubject to any other church as its mother church, and that the preſentations thereto ever had been from time IMMEMORIAL, by the name of the rectory and pariſh church of *Marſh Baldon*, and that the advowſon of ſuch rectory and pariſh church belonged to Mrs. *Lane*, as lady of the manor of *Marſh Baldon*, ſhe being the grand-daughter and heireſs of *Suſan*, daughter of *John Danvers*.

Whereto Mr. *Yateman* put in his anſwer, admitting Mrs. *Lane* ſeiſed of the manor of *Marſh Baldon*, and intitled to preſent an incumbent to the church or chapel of *Marſh Baldon*, in that ſome lord of that manor had founded the ſame on his own ground near to his manſion-houſe, and endowed it with lands for maintenance of a miniſter to perform divine ſervice therein; and that it's incumbent was in his own perſon ſeiſed of its profits, and enabled to recover and defend the ſame, in his own right, and as ſuch rector thereof had inſtitution, as being requiſite to veſt him therewith; but that ſuch church was founded many years after the eſtabliſhment of tithes in *England*, and within time of memory; and that it's founder could not endow it with any propriety, not being at his diſpoſal, in prejudice of the rights of the elder church, and that it was not a primative mother

mother church, or had any rectory or ſpiritual profits of common right appendant thereto; for that the church of *Dorcheſter* was its mother church, under which he claims, and acknowledged as ſuch by it's inhabitants; and that the preſentations had not, from time IMMEMORIAL, been to the rectory and pariſh church; but, on the contrary, for a long ſeries of years within memory, preſented to by name of a chapel, and had not the cure of ſouls of original right, but as a *ſuperadded* privilege; neither was the defendant *Lane* intitled to preſent to ſuch rectory; for that the addition of rectory was a modern addition, and uſurped and improper, in that the rectory or ſpiritual profits of *Marſh Baldon* did belong of common or original right to the church or chapel of *Marſh Baldon*, or of the advowſon of Mrs. *Lane*, neither was any ſuch rectory excepted by *Lewis Pollard* in any grant of his; but, on the contrary, only ſome portion of tithes (parcel of the rectory of *Baldon*) the rectory of *Marſh Baldon* being mentioned as parcel of the matters granted, and that plaintiff's right could not be prejudiced by the preſentation, or any other act of any perſon not intitled to the tithes or ſpiritual profits of *Baldon*; and that no proprietor of the rectory of *Baldon* was ever a party to any preſentation, and therefore their right not affected thereby; but admitted Dr. *Bacon* intitled to all ſuch tithes, parcel of the ſaid rectory of *Baldon*, as himſelf and predeceſſors had conſtantly enjoyed under the ſaid *Lewis Pollard*'s exception, as an addition to the original endowment of the church of *Marſh Baldon*.

On hearing, Mr. *Yateman* gave in evidence, and not diſproved by any witneſs, that the inhabitants of *Marſh Baldon* attended the viſitation of the church of *Dorcheſter*, viſitable, as a donative peculiar church, by

Plaintiff's proof.

by it's patron *Thomas Fettyplace*, Esq; or his official, as well as the inhabitants of the other *Baldons*, in acknowledgment of such church being their original parish church or mother church; and also proved by written evidence, that the presentations had *not* ever, from time IMMEMORIAL, been to the time of King *John*, and after the year 1209, to the chapel of *Baldington*, on condition of residence and payment of a pound of frankincense to the mother church of *Dorchester*, and that it appeared not to have any tithes or spiritual property belonging to it in the year 1291; and the word *rectory* was matter of addition subsequent to the demise to *Allen*, 14 *Jac.* I. and the exception therein contained; and that the presentations for a long series of years after it's foundation, was to the chapel, afterwards to the church, then to the parish church, as set out in the plaintiff's bill, and not before 1619, to the rectory; and no person claiming under the church of *Dorchester*, as party thereto, Mr. *Yateman* also in general proved the truth of the above historical narration, and that there was no such field as *Marsh-Baldon* field, but that all the tithes in question arose out of *Baldon* field, and no possibility of perambulation, without taking therein the whole circuit of such field.

Defendant's proofs.

The defendants gave no matter in proof relative to their own issue, or to counteract the plaintiff's evidence, proving only, that at this time there were two churches in *Baldon*, and each of them were parochial churches, and two parishes, the one called *Toot Baldon* church and parish, the other *Marsh Baldon* church and parish, and that each of such churches had sacraments, burials, *&c.* and that the defendant *Lane*, as lady of the manor of *Marsh Baldon*, had the advowson or right of presenting an incumbent

cumbent to the parish church of *Marsh Baldon*, and did present Dr. *Bacon*, and that he had institution and induction.

Francis Yateman, Gentleman, Plaintiff.

and

Sarah Cox, *Phanuel Bacon*, Doctor in Divinity, and *Jonathan Martin*, - - } Defendants.

*** *The case of the defendants, as stated in their own pleadings, extracted from the printed cases of appeal, delivered to the Lords, counsel, and parties concerned, previous to the hearing, with the manuscript judgments of the House indorsed thereon.*

IN the county of *Oxford*, there are two rectories and parish churches, which adjoin to each other, the one of them called *Toot Baldon*, and the other *Marsh Baldon*; of the former the plaintiff is the impropriate rector, and he and his predecessors have usually provided a curate, with a small stipend, to perform the ecclesiastical duties thereof; of the latter the defendant Mrs. *Lane* is the patron, and the defendant Dr. *Bacon* is the rector thereof.

The impropriate rector of *Toot Baldon*, as such, is intitled to a portion of tithes out of some parts of the lands lying within the rectory of *Marsh Baldon*, when these lands are in corn, or some of them in the proportion of one sheaf in ten, and in others, one in fifteen; but about the year 1760, the plaintiff thought proper to claim the hay tithes of such of those

thoſe lands, when in graſs, for which he received even tithes, when in tillage; but the defendant Dr. *Bacon*, as the rector of *Marſh-Baldon*, denied the plaintiff's right thereto, becauſe the plaintiff never had received the ſame; and therefore as againſt him, as rector, he could not be intitled to any tithes by way of portion or otherwiſe, which he had not conſtantly and accuſtomably taken.

Original bill filed in the *Exchequer*, in *Trinity* Term, 1760.

This cauſing diſputes between the plaintiff and defendant, Mrs. *Lane* (as owner of certain lands, which were covered by a *modus*, payable to the rector) and Dr. *Bacon* the rector, the plaintiff, in the year 1760, filed his original bill in the court of *Exchequer* againſt *William Cox* alone, who then rented of the defendant, Mrs. *Lane*, a piece of meadow or paſture ground, called *Smith's Piece*, lying within the pariſh of *Marſh Baldon*, parcel of the impropriate rectory of *Baldon*, and claimed to be intitled to the hay tithe ariſing on the ſaid piece of land, lying within the ſaid rectory. After the ſaid *William Cox* had put in his anſwer thereto, the plaintiff, in *Michaelmas* Term, 1762, amended his bill, and added Mrs. *Lane* and Dr. *Bacon* parties thereto, and thereby only claimed, by cuſtom, the tithes of all hay ariſing within that part of the ſaid pariſh of *Marſh Baldon*, which paid him tithes when in corn; which bill he amended again in *Hilary* Term, 1764, and added *Jonathan Martin* a defendant thereto, and there it reſted till *Hilary* Term, 1766, when the plaintiff altered his plan, by claiming as rector of *Baldon*, alias *Toot Baldon*, all manner of tithes in *Marſh Baldon*, as being included in his rectory, except what Dr. *Bacon* could preſcribe for, who, he inſiſted, was only curate of *Marſh Baldon*.

Firſt amended bill filed in *Michaelmas* Term, 1762.

In *Hilary* Term, 1764, ſecond amended bill filed.

In *Hilary* Term, 1766, third amended bill filed, whereby plaintiff claimed as rector.

And

And the plaintiff, by his ſaid laſt amended bill, ſtated, that the rectory of the pariſh of *Baldon*, in the county of *Oxford*, before the diſſolution of the monaſtery of *Dorcheſter*, belonged to, and was part of, the poſſeſſion of the ſaid monaſtery, as a rectory impropriate; and that the ſaid rectory comprehended the townſhips of *Baldon*, alias *Toot Baldon*, *Saint Lawrence Baldon*, and *Little Baldon*.

That in the ſaid townſhip of *Marſh Baldon*, a certain chapel was erected many years ago, and long before the ſaid monaſtery was diſſolved, and that the ſame was only a chapel of eaſe to *Baldon*, and ſerved by a curate, and was for many years preſented to as a chapel, and in proceſs of time took the name of a church; but that the townſhip of *Marſh Baldon* was comprehended within the ſaid pariſh and rectory of *Baldon*, and that the ſaid rectory belonged to the ſaid monaſtery of *Dorcheſter*, as an impropriate rectory, and that, upon the diſſolution of the ſaid monaſtery, the impropriate rectory of *Baldon*, including *Marſh Baldon*, became veſted in the crown, and that King *Henry* the *Eighth* granted the ſaid rectory of *Baldon* to one *Topps* for life; and that Queen *Elizabeth* afterwards granted the reverſion of the ſaid rectory to one *Hall* and his heirs, and conveyed the ſame to *Anthony Pollard* (the anceſtor of the defendant *Elizabeth Lane*) and *Philippa* his wife.

That ſome time in the reign of King *James* the *Firſt*, the ſaid chapel or townſhip acquired the reputation of a pariſh and rectory, and belonged to *Lewis Pollard*, grandſon of the ſaid *Anthony Pollard*, as parcel of the original rectory of *Baldon*; and that in the reign of King *Charles* the *Firſt*, *Lewis Pollard* ſold and conveyed the rectory of *Baldon*, and alſo the

the rectory, or reputed rectory of *Marſh Baldon*, to one *Jennens* (except the tithes of *Little Baldon* herein after mentioned), and that the plaintiff, by ſeveral meſne conveyances, became and then was owner thereof, and that he was then, and for ſeveral years paſt had been, ſeiſed in fee, and owner of the impropriate rectory of *Baldon* aforeſaid (comprehending *Baldon*, alias *Toot Baldon*, *Saint Lawrence Baldon*, *Marſh Baldon*, and *Little Baldon*), and that, as owner of the ſaid rectory, he was intitled to all manner of tithes, both great and ſmall, yearly ariſing in the ſaid townſhip of *Marſh Baldon*, *Toot Baldon*, and *Saint Lawrence Baldon*.

That during the year 1760, and for ſome years then paſt, *William Cox*, a defendant to the original bill, occupied a piece of land, called *Smith's Piece*, within the ſaid impropriate rectory; and having the preceding year laid down all or the greateſt part of the ſaid piece with clover graſs ſeeds, he did in the ſaid year reap and gather therefrom ſeveral conſiderable quantities of hay, and that the tithes thereof were due, and ought to have been paid to the plaintiff, and were worth thirty ſhillings and upwards.

That in the year 1761, the ſaid defendant *William Cox* occupied a tenement in *Toot Baldon*, or *Lawrence Baldon*, within the ſaid impropriate rectory of *Baldon*, conſiſting of a meſſuage, barn, and homeſtall, and about forty acres of land thereto belonging; which ſaid forty acres lay diſperſedly in the common fields of *Baldon* aforeſaid; and that the defendant *William Cox*, during the ſaid year 1761, alſo occupied another tenement in *Marſh Baldon*, conſiſting of about twenty acres of arable land, lying

ing in the ſaid common fields of *Baldon*, and within the ſaid impropriate rectory of *Baldon*, and that the ſaid defendant *William Cox* cut from off the ſaid reſpective tenements, divers large quantities of green clover, to the tithes of ſuch part thereof as was not ſpent by plough cattle employed in plowing, cultivating, and manuring lands within the ſaid rectory, as paid tithes to the plaintiff, he claimed to be intitled, and that the ſame were of the value of about twenty ſhillings.

That the greateſt part of the lands belonging to the townſhips, hamlets, or villages of *Marſh Baldon*, *Saint Lawrence Baldon*, and *Toot Baldon*, lie intermixed in the ſame common field, and that the defendant *William Cox* had commons for two cows and ſixty ſheep, belonging to his farm in *Toot Baldon*, or to *Lawrence Baldon*, which he, in the year 1761, kept and depaſtured thereon, the tithes whereof, to the value of forty ſhillings, or thereabouts, the plaintiff claimed to be intitled to, as rector of the ſaid impropriate parſonage or rectory of *Baldon* as aforeſaid.

That in the year 1759, *Samuel Spindler* occupied a piece of meadow or paſture land, called *Battin's Cloſe*, containing about three acres, and that in the year 1761, *Hugh Wright* occupied a piece of meadow or paſture ground, called *Cheney's Cloſe*, otherwiſe *Hayes* alias *Burnthouſe Cloſe*, containing, by eſtimation, about two acres; and that in the year 1762, *John Arthur* occupied two other cloſes of meadow ground, alſo called *Battins*, containing about one acre; the tithes of corn, grain and hay, yearly ariſing in and upon the ſaid ſeveral cloſes reſpectively ſo occupied by the ſaid *Spindler*, *Wright*, and *Arthur*, the ſaid plaintiff claimed his right aforeſaid, and that the ſaid *Spindler*, *Wright* and *Arthur*, did

did reſpectively in the years 1759, 1761, and 1762, ſet out the tithes of the defendant *William Cox*, in 1759, entered on the ſaid cloſe, called *Battin's Cloſe*, then occupied by the ſaid *Samuel Spindler*, and carried away the ſaid tithes, being of the value of ſixteen ſhillings, or thereabouts, and converted the ſame to his own uſe; and that the ſaid defendant *William Cox* did alſo, in the year 1761, enter on the ſaid piece of land called *Cheney's* alias *Hayes's*, alias *Burntheuſe Cloſe*, after the tithes thereof were ſet out by the ſaid *Wright*, for the plaintiff's uſe as aforeſaid, and took away the ſaid tithes, being of the value of about five ſhillings, and converted the ſame to his own uſe; and that one *John Harper*, as ſervant to, and by the order of the defendant Dr. *Bacon*, and of the defendant *William Cox*, or one of them, in or about *July* 1762, entered upon the before mentioned cloſe, in the occupation of the firſt named *John Arthur*, and carried away the tithes thereof ſet out by him for the plaintiff's uſe, being of the value of about three ſhillings, and delivered the ſame to the defendant *William Cox*, which he converted to his own uſe.

That there is a piece of land in the ſaid rectory of *Baldon*, called *Knowles*, heretofore parcel of the common field of *Baldon*, but for many years paſt enjoyed in ſeveralty, and planted with furze; of which five lays, or five half acres, were, in the year 1761, in the occupation of the defendants Dr. *Bacon*, or Mrs. *Lane*, by virtue of a leaſe from the provoſts and ſcholars of *Queen's College*, *Oxford*; and the ſaid defendant did, in that year, cut and gather therefrom ſeveral conſiderable quantities of furze faggots, the tithes whereof, of the value of fourteen ſhillings, or thereabouts, the plaintiff claimed in his right aforeſaid.

That

That from 1ſt *January*, in the year 1760, the defendant Mrs. *Lane*, had occupied certain pieces of land called *Hatchet Cloſe*, *Forty Acres Piece*, and *Hatchet Piece*, and had cut therefrom ſeveral conſiderable quantities of hay, to the tithe whereof, of the value of forty ſhillings, or thereabouts, the ſaid plaintiff claimed to be intitled in right aforeſaid.

That *Lewis Pollard*, being ſeiſed in fee of an eſtate called *Little Baldon Farm*, lying within the ſaid impropriate rectory, did, on the ſale of the ſaid impropriate rectory, to *James Jennens*, Eſq; and his heirs, reſerve all the tithes growing on the ſaid eſtate called *Little Baldon*, in order to hold the ſame exempt from all kind of tithes whatſoever, and that by means of ſuch reſervation, the ſaid *Lewis Pollard* thenceforward held the ſaid eſtate called *Little Baldon*, and all the lands belonging thereto, free from all kind of tithes, both great and ſmall; and that he did, about the year 1730, ſell and convey the ſaid eſtate, together with all the tithes thereof, to *John Fiennes*, Eſq; and one *Auſtin*, or to ſome others, in truſt for them, or one of them, and that the ſaid *Fiennes* and *Auſtin*, or ſuch other purchaſer of the ſaid eſtate called *Little Baldon*, by means of ſuch conveyances, did thenceforwards hold the ſaid eſtate, and all tithes whatſoever ariſing therefrom.

That the ſaid eſtate, called *Little Baldon*, laid in part within the townſhip of *Toot Baldon*, and other part within the townſhip of *Marſh Baldon*; but that by means of the reſervations aforeſaid, no tithes were paid for the ſame, but the lands belonging to the ſaid eſtate lying diſperſedly over the whole common fields of *Baldon*, the ſaid *Fiennes* and *Auſtin*, being deſirous to contract the extent of *Little Baldon Farm*, and to have the lands belonging thereto lie

more compact, entered into agreements with ſundry perſons of the ſaid ſeveral townſhips of *Toot Baldon*, *Saint Lawrence Baldon*, and *Marſh Baldon*, with the provoſt and ſcholars of *Queen's College*, *Oxford*, to exchange part of the ſaid *Little Baldon Farm* for the lands of ſuch perſons with whom thoſe lands lay intermixed; and that, amongſt other perſons, the ſaid *Fiennes* and *Auſtin* agreed to exchange certain pieces of land, part of the ſaid farm called *Little Baldon*, called *Hanging Lands*, a cloſe next to *Newnham Grounds*, and one acre adjoining, afterwards part of the homecloſe of one *Humphry Atherton* of *Baldon*, for the lands of the ſaid *Humphry Atherton*, lying in certain fields of *Baldon*, called *Eaſt Little Field*, *Weſt Little Field*, *Dudmeade*, *North-wood Field*, *South-wood Field*, and for one acre of land in *Sands*, and did alſo exchange with one *James Chaire*, or with ſome other owner of the land by him then occupied, ſundry lands, part of the ſaid *Little Baldon Farm*, lying in certain places in *Baldon Field*, called *Appleder Field*, *Hatchet Furlong*, and *Short-mark-hill*, for other lands then belonging to or occupied by the ſaid *James Chaire*, lying in *Fleet Furlong*, in the common field of *Baldon* aforeſaid, and there intermixed with the lands of the ſaid *Fiennes* and *Auſtin*; and that ſuch exchanged lands belonging to the ſaid *Humphry Atherton*, and *James Chaire*, at the time of ſuch exchange, paid tithes of all kinds to the plaintiff's ſaid impropriate rectory, and now compoſe part of the ſaid *Little Baldon Farm*.

That the ſaid *Fiennes* and *Auſtin*, being afterwards deſirous of having the lands ſo taken by them in exchange, exempted from the payment of tithes, entered into ſome ſubſequent agreement with the ſaid *James Jennens*, the then owner and proprietor of the plaintiff's

plaintiff's ſaid rectory of *Baldon*, to exchange the tithes of the lands by them parted with on ſuch exchange (particularly of the piece of land then belonging to or occupied by the ſaid *Humphry Atherton*, and *James Chaire*) for the tithes of the ſaid pieces called *Hanging Lands*, the ſaid cloſe next *Newnham Grounds*, and the one acre adjoining to and then part of the homeſtall of the ſaid *Humphry Atherton*; and for the tithes of the ſaid lands of the ſaid *James Chaire* in *Appleder Field*, *Hatchet Furlong*, and *Short-mark-hill*; and accordingly articles of agreement, dated 20th *September*, 1649, were entered into for that purpoſe; which tithes ſo had from the ſaid *John Fiennes*, on the ſaid exchange, are now veſted in the plaintiff, as proprietor of the ſaid rectory of *Baldon* as part thereof.

That the defendant *Jonathan Martin* held and occupied the ſaid piece called *Hanging Lands*, during the years 1763 and 1764, and for ſeveral years then paſt, as tenant to the defendant Dr. *Bacon*; and that he did, in the years 1763 and 1764, and during ſeveral preceding years, make conſiderable quantities of hay therefrom, and fed and depaſtured a great number of cows, ſheep, and other titheable cattle thereon; to the ſeveral tithes ariſing therefrom, (which the plaintiff eſtimated at three pounds a year) he claimed to be intitled in the ſame manner, as the tithes thereof belonging to the ſaid *Lewis Pollard* at the time he conveyed the ſaid lands, with the tithes thereof, to the ſaid *John Fiennes* and *Auſtin*, and as he enjoyed the other part of his ſaid eſtate called *Little Baldon*.

That the defendant Dr. *Bacon* inſiſted, that he is rector of the pariſh church of *Marſh Baldon*, and

that in right thereof he is intitled to all tithes whatſoever, both great and ſmall, ariſing in and upon the ancient manor farm belonging to the manor of *Marſh Baldon*, and in and upon ſeveral other lands in *Marſh Baldon* aforeſaid, and that the ſaid pieces called *Smith's Piece*, *Forty Acre Piece*, and *Hatchet Cloſe*, and *Hatchet Piece*, are part of the ancient manor farm, or are part of the other lands in *Marſh Baldon*, which are titheable to the defendant Dr. *Bacon*; but the plaintiff charged, that the rectory of *Marſh Baldon*, either as a rectory of itſelf, or as parcel of the rectory of *Baldon*, is in the plaintiff, and that the defendant Dr. *Bacon* was and is only curate of *Marſh Baldon*.

That the defendants inſiſted the plaintiff is intitled only to the tithes of corn in the ſaid pieces called *Smith's Piece*, *Forty Acres Piece*, *Hatchet Cloſe*, and on *Battin's* and *Cheney's* cloſes, and not to any tithes of hay ariſing therefrom, or to any tithes on the ſaid five lays or half acres of furze; and that the ſum of fourteen pounds a year in money then was, and ever had been yearly paid by the owners of the ſaid manor farm of *Marſh Baldon*, or their tenants, to the rector of *Marſh Baldon*, in lieu of all tithes whatſoever ariſing on the ſaid manor farm; and that he pays the defendant Dr. *Bacon* a ſatisfaction for the tithes thereof.

That the defendants *William Cox*, and Dr. *Bacon*, inſiſted, that all tithes of hay ariſing in or upon *Smith's Piece*, *Forty Acres Piece*, *Hatchet Cloſe*, *Hatchet Piece*, and on *Battin's* and *Cheney's* cloſes, or in and upon any other lands in *Marſh Baldon*, belonging to the defendant Dr. *Bacon*, as rector of *Marſh Baldon*, and that the plaintiff hath no right to any tithes ariſing from any lands whatſoever in *Marſh Baldon*, other

other than corn tithes; and that the defendant Mrs. *Lane* inſiſted, that the manor of *Marſh Baldon* belonged to her, and that ſhe pays a *modus*, or other yearly payment to the defendant Dr. *Bacon*, in lieu of all tithes ariſing on the ſaid ancient manor farm; whereas the plaintiff charged he was intitled to the hay tithes of the ſaid ſeveral pieces.

And therefore the plaintiff prayed, that the defendants might be compelled to a fair account with him, for all ſuch tithes and tenths by them reſpectively withheld or taken as aforeſaid; and to make ſatisfaction for the ſame, he waiving all penalties or forfeitures, that might have accrued from the not having ſet forth the ſame, and for general relief.

The anſwers of the defendants Mrs. *Lane* and Dr. *Bacon*.

To which ſaid bills the defendants Mrs. *Lane* and Dr. *Bacon* put in ſeveral anſwers, by which they admitted, that the rectory of *Baldon*, which is otherwiſe called *Toot Baldon*, and the rectory of *Marſh Baldon*, both lying in the county of *Oxford*, are two ancient and diſtinct pariſhes and rectories (adjoining to and in ſome parts intermixed with each other), and that the manors of *Toot Baldon*, and *Marſh Baldon*, are likewiſe two ancient and diſtinct manors, and nearly, if not wholly, co-extenſive with the ſaid pariſhes; and that they believed the whole of the ſaid rectory of *Baldon*, or *Toot Baldon*, and all the tithes thereof, as well great as ſmall, were, before the diſſolution of the monaſtery of *Dorcheſter*, appropriated to and part of the poſſeſſions of the ſaid monaſtery, as a rectory appropriate; and that the ſame comprehended the diſtricts or townſhips of *Toot Baldon*, *Saint Lawrence Baldon*, (otherwiſe called *Biſhop's Baldon*), and *Little Baldon*; but that the rec-

tory or pariſh of *Marſh Baldon* was never comprehended within the ſaid rectory of *Baldon*, alias *Toot Baldon*; nor was the ſame wholly appropriated; but they admitted, that certain portions of the ſaid rectory of *Marſh Baldon*, or of the great tithes thereof, were anciently appropriated to ſome corporation ſpiritual; but to what in particular, or whether they were appropriated to the ſaid monaſtery of *Dorcheſter*, or ever did belong thereto, as part of the poſſeſſions thereof, they did not know, nor could form any belief; and both the ſaid defendants ſaid, that there is within the ſaid pariſh of *Marſh Baldon*, alias *Marſh Baldington*, an ancient pariſh church belonging thereto, which has been anciently preſented to, as a chapel with the cure of ſouls, but they never heard that the ſame was at any time a chapel of eaſe to *Baldon* pariſh, or ſerved by a curate; but that the ſaid pariſh of *Marſh Baldon* has been, for ſome ages paſt, conſidered as a pariſh and rectory of itſelf; and particularly, that in an ancient grant, 3 *Edw.* III. which was in the year 1330, whereby the manor of *Marſh Baldington*, was granted by *Robert Delamere*, knight, to *Walter de Chiltenham*, and *Richard de Allen*, the latter is ſtiled rector of the church of *Marſh Baldington*, and that the like appears in other deeds and ancient rolls of the manor courts held at *Marſh Baldon*; and that they believed, that on the diſſolution of the ſaid monaſtery at *Dorcheſter*, the ſaid rectory appropriate of *Baldon*, or *Toot Baldon*, (but not comprehending *Marſh Baldon*, ſave as to the portions aforeſaid) became veſted in the crown; and that *Anthony Pollard* Eſq; and *Philippa* his wife, became ſeiſed of the ſaid rectory impropriate of *Baldon*, alias *Toot Baldon*, by meſne aſſignments from Queen *Elizabeth*; and they admitted, that the ſaid rectory impropriate of *Toot Baldon* afterwards came to *Lewis Pollard*,

Pollard, Eſq; but they denied that the advowſon of the ſaid church of *Marſh Baldon*, or the ſaid manor or eſtate of *Marſh Baldon*, ever belonged to the ſaid *Lewis Pollard*; but they believed, that *John Danvers* Eſq; was ſeiſed of the ſaid manor, eſtate, and advowſon, of *Marſh Baldon*, at the ſame time when the ſaid rectory impropriate of *Toot Baldon* was veſted in the ſaid *Lewis Pollard*; and that the ſame did not come into the family of the *Pollards*, till ſome years after, upon the marriage of *John Pollard*, Eſq; ſon of the ſaid *Lewis Pollard*, with *Suſan D'Anvers*, daughter of the ſaid *John D'Anvers*, who was the defendant Mrs. *Lewis*'s grandmother, and they believed the ſaid *Lewis Pollard* was ſeiſed of the ſaid rectory impropriate of *Toot Baldon*, and of the ſaid appropriate portion of the great tithes of *Marſh Baldon*; and that, being ſo ſeiſed, he did, in or about the year 1626, make ſome conveyance thereof to *James Jennens*, Eſq. and that the ſaid rectory impropriate of *Toot Baldon*, and the ſaid portions, (except ſuch of the tithes thereof as were excepted or reſerved by the ſaid *Lewis Pollard*, or have been ſince granted away) are now veſted in the plaintiff; but whether as united to the rectory of *Toot Baldon*, or under any diſtinct appropriation or conveyance, they referred to the ſeveral conveyances thereof, both as to the plaintiff's tithe, and the particulars of what he is intitled to, when the ſame ſhould be produced; and they admitted, that the plaintiff may be intitled to all manner of tithes, as well great as ſmall, ariſing within the rectory impropriate of *Toot Baldon*, which now remain in him; but denied he is intitled to any tithes ariſing within the ſaid pariſh or rectory of *Marſh Baldon*, other than to ſuch portions of tithes as aforeſaid, or ſuch of them as were not excepted, reſerved, or granted away in exchange; but

they admitted he is intitled to the ſaid portions of tithes, ariſing within the ſaid rectory of *Marſh Baldon*, belonging to the ſaid impropriate rectory of *Baldon*, otherwiſe *Toot Baldon*; and to have and enjoy the ſame, ſo far as they have been conſtantly and immemorially had and enjoyed by him, and thoſe under whom he claims: but they denied that he is intitled to any hay tithes ariſing on the ſeveral pieces of land, in the bill mentioned, called *Smith's Piece*, *Forty Acres Piece*, *Battin's Cloſe* of three acres, *Cheney's* otherwiſe *Hayes's*, otherwiſe *Burnt Houſe Cloſe*, or *Battin's Cloſe*, of one acre, or of the tenement of twenty acres, in the occupation of the defendant *William Cox*; but they admitted that he was intitled to all the tithes of the other tenements of forty acres, in the occupation of the ſaid *William Cox*, as lying within the pariſh of *Toot Baldon*, and belonging to that rectory impropriate; and they admitted, that the defendant *William Cox* did, during the year 1760, occupy *Smith's Piece*; and that he (having in the preceding year laid down all or the greateſt part thereof with clover graſs ſeed) cut and carried away the crop thereof, without ſetting out any tithes for the plaintiff; and that, during the year 1761, he alſo occupied the ſaid land, or tenement of twenty acres (lying partly in the common fields of *Baldon*, and partly incloſed) and that, during the ſaid laſt mentioned year, he cut and carried away ſome green clover therefrom, but not more, as they believed, than was ſpent by his plough cattle, neceſſarily employed in the manuring and cultivating ſuch of his lands as paid tithes to the plaintiff; and they believed, that the ſaid *Samuel Spindler* did, in in the year 1759, occupy the ſaid piece of meadow or paſture land called *Battin's Cloſe*, containing about three acres; and that *Hugh Wright*, or *Martha Wright*

Wright his mother, did, during the whole of the ſaid year 1761, occupy the ſaid piece of meadow or paſture ground, called *Cheney's*, otherwiſe *Hayes's*, otherwiſe *Burnt Houſe Cloſe*, containing by eſtimation, about two acres, and that *John Arthur* did, during the year 1762, occupy the ſaid two cloſes, called alſo *Battin's*, containing together about one acre; and the defendant Dr. *Bacon* ſaid, that the defendant *William Cox* took and carried away the tithes of the graſs of the meadows, or ſome part thereof, as his tenant, and claiming the ſame in his right.

That the ſaid Dr. *Bacon* did not believe that the ſaid *Samuel Spindler*, *Hugh Wright*, or *Martha Wright*, and *John Arthur*, or either of them, did ſet out the tithes of their reſpective meadow lands for the plaintiff's uſe, or as belonging to him, but that whatever tithes were ſet out, were only for the uſe of the ſaid defendant Dr. *Bacon*, as his tenant; but he admitted, that in the year 1759, being the only year in which *Battin's Cloſe* of three acres is known to be mowed, one *Atherton*, as tenant to the plaintiff, did for the firſt time come into the ſaid cloſe, and ſcrambled away ſome of the hay made there, under pretence of tithes, and the defendant *William Cox*, as tenant to the defendant Dr. *Bacon*, did, at the ſame time, carry away ſome of the hay as his tithe thereof; and both the defendants ſaid, they never heard, nor believed, that the plaintiff, or his tenant, ever took away tithe hay from any of the ſaid meadows or cloſes, except at that time, in manner aforeſaid; and the ſaid defendants admitted, that the greateſt part of the common lands belonging to the ſaid pariſhes of *Toot Baldon* and *Marſh Baldon*

Belden lie intermixed in the common fields, in which the ſaid pariſhes are, in various parts and parcels; and that each of the tenants and occupiers of lands in the common fields, belonging to either of the ſaid pariſhes hath, in reſpect of his ſaid lands, common there for a certain number or ſtint of cows and ſheep, (*viz.*) one cow and thirty ſheep for each yard-land, or twenty acres, and that ſuch cattle neceſſarily common, promiſcuouſluy, over the ſaid whole common fields of *Belden*; and inſiſted, that the defendant *William Cox* had not only a right to common, in the ſaid field for two cows and ſixty ſheep, in reſpect of his ſaid tenement of forty acres of land lying in *Saint Lawrence Belden*, alias *Biſhop's Belden*; but that he had alſo a right to common for one cow and thirty ſheep, in reſpect of his ſaid tenement of twenty acres, lying in *Marſh Belden*, and that he had a further right to common there, for a much greater number of cows and ſheep, being commons appertaining to lands he rented of the defendants, or one of them, lying in the ſaid pariſh of *Marſh Belden*; and the ſaid defendants believed, that the defendant *William Cox* did, in the ſaid year 1761, keep and depaſture two cows and ſixty ſheep, or more, in the ſaid common fields, but which were not nearly ſufficient to ſtock his full commons belonging to him, in reſpect of lands in *Marſh Belden* which he rented of the rector; and therefore they believed he ſo commoned for his lands in *Marſh Belden* as aforeſaid; but the defendants ſaid, they did not know what quantities of milk, lambs, or wool, or other ſmall tithes, were produced by the ſaid cows and ſheep, nor what was the value of the tithes thereof; but the defendant Dr. *Bacon* ſaid, that all the ſmall tithes ariſing from cows or ſheep com-

commoned in the ſaid field, in reſpect to lands belonging to *Marſh Baldon* pariſh belonged to him, and not to the plaintiff; and that ſome of the farmers holding lands in both the ſaid pariſhes, and their commons being ſcarcely ever full ſtocked, the ſmall tithes ariſing from ſuch commons have been uſually paid for the whole to the tenant of the tithes of that pariſh, in which the greateſt part of the lands lay, whereby much trouble was ſaved to the farmers, and many diſputes prevented; and there was, upon the whole, little difference to the rectors by ſo doing, and no diſpute has aroſe thereon, till that now raiſed by the plaintiff.

Both the ſaid defendants admitted, there is a piece of heath ground lying in *Toot Baldon* and *Marſh Baldon* pariſhes, or one of them, but belonging to the ſaid manor of *Marſh Baldon*; and that part of the ſaid heath, being riſing ground, is diſtinguiſhed by the name of the *Knowle*, and has been for many years planted with furze, and enjoyed in ſeveralty, being cut once in four or five yers; and that ſame is commonable to the owners of lands in both the ſaid pariſhes at certain times, but differing with reſpect to the time of commoning their cows and ſheep thereon.

But, at all events, the defendant Dr. *Bacon* inſiſted, that, if the plaintiff had any right to tithes of any part of the ſaid furze, it could only be on ſuch part as lies within *Toot Baldon* pariſh, and that the defendant Dr. *Bacon* admitted, that he held five lays or half acres of land in the ſaid *Knowle*, as belonging to an eſtate held by him under a leaſe from the provoſt and ſcholars of *Queen's College*, *Oxford*, aforeſaid; and that in the year 1761, he cut the furze

furze and fern thereof, to the amount of above nine hundred faggots, and that he carried away the ſame, without ſetting out the tithes (which might be of about the value of ſix ſhillings) or making the plaintiff any ſatisfaction for the ſame, upon a preſumption that no tithes were due; and for that the ſame were not intended to be, nor were ſold; but that the whole of the ſaid furze and fern faggots mixed therewith, together with other faggots bought by him, were uſed in burning a kiln of lime, together with ſuch bricks as were neceſſary for burning the lime, the whole of which lime (or more than the ſaid *Knowle* faggots alone would have burnt) were uſed in the manuring and meliorating lands in the ſaid *Forty Acres Piece*, in the occupation of the defendant *William Cox*; whereof the plaintiff receives a portion of the great tithes, when in corn; and that the bricks were uſed, with the reſidue of the ſaid lime, in repairing Dr. *Bacon*'s farm-houſe, in *Toot Baldon* pariſh; and therefore being ſpent upon the premiſes, within the ſaid pariſh, he inſiſted they were thereby diſcharged from the payment of tithes, if otherwiſe liable thereto.

Both the ſaid defendants admitted, that there are in *Marſh Baldon* certain pieces of land called *Hachet Cloſe*, containing about four acres; another piece of land called *Forty Acres Piece*, containing twenty acres, and another piece, called *Hatchet Piece*, or *Hatchet Furlong*, containing eleven acres, or thereabouts; all which had been in the occupation of the defendant Mrs. *Lane*, from 1 *Jan.* 1761, and then were in her occupation; and that during that time ſhe cut ſome hay therefrom, and that the hay tithes of the ſaid *Forty Acres Piece* were worth, one year with another, about forty ſhillings, but inſiſted the ſame was covered by

by a *modus* or compoſition of fourteen pounds a year, after mentioned, and that the ſaid *Hatchet Piece* and *Hatchet Cloſe*, being part of *Little Baldon* eſtate, were exempt from tithe.

Both the defendants believed, that the ſaid *Lewis Pollard* was in his life-time ſeiſed in fee, to him and his heirs, of an eſtate lying in or near *Little Baldon* aforeſaid, called *Little Baldon* farm; and that part thereof lay in the pariſh of *Toot Baldon*, and part in the pariſh of *Marſh Baldon*; and that the tithes of ſuch part thereof as lay in *Toot Baldon* pariſh, belonged to the rectory of *Toot Baldon*, and ſo far as the ſame lay in *Marſh Baldon* pariſh, belonged to the rectory of *Marſh Baldon*; and that, as, according to the plaintiff's own ſhewing, *Lewis Pollard* excepted, out of his ſale, to the ſaid *James Jennens*, not only the tithes of *Little Baldon* farm, belonging to himſelf, but alſo all ſuch tithes as belonged to the miniſter or rector of *Marſh Baldon*, which had been received and enjoyed by him, for twenty-nine years then laſt paſt, they inſiſted, that none of the tithes ariſing on the ſaid *Little Baldon* eſtate, or which had been, for the ſaid twenty-nine years, had or enjoyed by the rector or miniſter of *Marſh Baldon* aforeſaid, paſſed by the ſaid *Lewis Pollard*'s conveyance, whether ſuch tithes originally belonged to the ſaid rectory or pariſh church of *Marſh Baldon*, or had been by any means granted to, or ſuffered to be enjoyed by, any of the rectors or miniſters of *Marſh Baldon*.

The defendant Mrs. *Lane* admitted, that *Little Baldon* farm was, at the time of the ſaid ſale and reſervation, a freehold eſtate of inheritance, and believed, that under ſuch exception or reſervation, the ſaid

ſaid *Lewis Pollard* and his heirs continued to enjoy the ſaid eſtate, as he had done before, free and exempt from all kind of tithes whatſoever (ſave ſuch as belonged to the rector of *Marſh Baldon*, in right of that part of the ſaid farm which lay in *Marſh Baldon* pariſh) and ſhe inſiſted, that ſuch part of the ſaid *Little Baldon* farm, as deſcended to or was otherwiſe veſted in her, as deſcendant and heir of the ſaid *Lewis Pollard*, ought to be held free and exempt from payment of all tithes whatſoever, ſave as aforeſaid.

Both the defendants ſaid, they did not know or believe, that *Lewis Pollard* did, in or about the year 1730, or at any time, ſell or convey the ſaid eſtate, called *Little Baldon* farm, together with all the tithes thereof, to *John Fiennes* and *Auſtin*, in the bill named, or to any perſon or perſons in truſt for them, or any of them; but on the contrary they believed, that the ſaid *Lewis Pollard*, or his ſon *John Pollard*, continued owner of the ſaid eſtate or part thereof, after the ſaid year, for that the ſame was, in or about the year 1635, ſettled by the ſaid *Lewis Pollard*, on the marriage of his ſaid ſon *John* with *Suſan D'Anvers* (the defendant Mrs. *Lane*'s grand-mother), and that before ſuch marriage, her father Mr. *D'Anvers* was ſole owner of the ſaid *Marſh Baldon* manor and eſtate, together with the advowſon of *Marſh Baldon*, and that *Lewis Pollard*, or *John Pollard*, afterwards joined with the ſaid *John Fiennes* as a truſtee in ſelling or exchanging ſome of the lands belonging to the farm, together with the tithes thereof, and that the greateſt part of the ſaid eſtate was afterwards ſold, exchanged, or conveyed away, to ſome perſon, under whom one Mrs. *Smith* enjoys the ſame, free and exempt from all tithes, great and ſmall; and that the

the remaining part thereof belonged to the ſaid defendant Mrs. *Lane*, who therefore inſiſted, that the ſaid pieces of land called *Hatchet Piece* and *Hatchet Cloſe*, and the other lands part of the ſaid *Little Baldon* farm, had been, and ought to be, ſince the ſaid exception, free from the payment of all tithes, except what the rector of *Marſh Baldon* is intitled to for ſuch part thereof as is in *Marſh Baldon* pariſh, and ſuch of the tithes thereof as have been ſince ſeparated and ſold therefrom, and ſuch of the lands belonging to the ſaid farm (if any) as the plaintiff ſuggeſts to have been afterwards ſold to the ſaid *James Jennens*.

Both the defendants believed, that divers incloſures were formerly made by the ſaid *Lewis Pollard*, and *John Pollard*, of their lands, which lay intermixed with other lands in the open fields of *Toot Baldon*, and *Marſh Baldon*, commonly called *Baldon* common field; and that for that purpoſe they made divers exchanges of land with *Humphrey Atherton*, and the ſaid provoſt and ſcholars of *Queen's College*; but they knew not whether the eſtate of *Little Baldon* did at that time lie diſperſed over the whole common fields of *Baldon*, or what other exchanges, or with whom they were made, for that purpoſe, but they believed, that certain tithes or portions of tithes were, in or about the year 1649, ſold and conveyed by the ſaid *John Fiennes* and *John Pollard*, to the ſaid *James Jennens*, under which conveyance the ſaid *James Jennens* became intitled to the corn tithes of *Hatchet Piece* (which is a piece of land ſhooting on *Hatchet Pool*, and thereby kept diſtinct from *Hatchet Cloſe*) and alſo to the corn tithes of *Hanging Lands*, and of a certain cloſe of about four acres, next to *Newnham Grounds*, and of one acre more, called *Woodſide*

Woodſide Cloſe, then in the occupation of the ſaid *Humphrey Atherton* (but not adjoining to his homeſtall, being diſtant near a mile from it) as alſo to the corn tithes of ſeveral lands in the common fields, being all part of *Little Baldon* farm; but they never heard that the corn tithes of *Hatchet Cloſe* were ſold to *James Fennens* with the ſaid other tithes; on the contrary they believed that the ſame had been taken by the plaintiff and his father by incroachment and without right.

Both the defendants ſaid, it might be true, that ſuch of the tithes of *Little Baldon* farm, as were ſold or exchanged by the ſaid *John Pollard*, *John Fiennes*, and *Auſtin*, or any of them, or to or with the ſaid *James Fennens*, may be now veſted in the plaintiff, but not as impropriator of the rectory of *Toot Baldon*, but as grantee thereof under the ſaid purchaſe deeds or agreements; and the defendant Dr. *Bacon* inſiſted, that the ſaid *Lewis Pollard*, *John Pollard*, *John Fiennes*, and *Auſtin*, nor any of them, could legally convey or ſell any of the tithes belonging to the rector of *Marſh Baldon*, but that the ſame were, and ſtill are, due to the rector of *Marſh Baldon*, as before ſuch ſale or exchange were had or made.

The defendant Dr. *Bacon* admitted, that the defendant *Jonathan Martin* did during the ſeveral years 1762, 1763, and 1764, hold four cloſes of land called *Hanging Lands*, lying in the ſaid pariſh of *Marſh Baldon*, and containing together twenty-eight acres, as tenant to him by leaſe, and that part thereof had been laid down in graſs ſeeds and mowed or depaſtured, and that ſome hay and other tithes did ariſe therefrom, during the ſaid years; but he inſiſted, that the plaintiff was not intitled to any tithes ariſing

ariſing therefrom (except corn tithes as aforeſaid) nor did the ſame, as he believed, belong to *Lewis Pollard*, at the time of the ſaid ſale, exception, or reſervation; or to the ſaid *John Pollard*, *Fiennes* and *Auſtin*, at the time of ſuch exchange; but the ſame did and do belong to the rector of *Marſh Baldon*, and have been conſtantly and immemorially ſo held and enjoyed by him and the former rectors of *Marſh Baldon*, except when interrupted by the ſaid *Joſeph Atherton*.

The defendant Mrs. *Lane* ſaid, ſhe was and is owner of the ſaid manor of *Marſh Baldon*, and alſo of the ſaid manor farm; and that a *modus* or compoſition of fourteen pounds a year is due and payable, and has been for time immemorial duly paid to the rector for the time being of the ſaid pariſh of *Marſh Baldon*, by the owners of the ſaid manor farm, in lieu of all tithes whatſoever, great and ſmall, ariſing therefrom; and therefore ſhe claimed all the titheable matters, ariſing on the ſaid farm, to her own uſe, without ſetting out the tithes thereof (ſave and except the portion of the tithes of corn, in the proportion of one in fifteen, in certain pieces, part of the ſaid manor farm, which ſhe admitted belonged to the plaintiff, as appropriated to the rectory of *Toot Baldon*) and ſhe alſo inſiſted to be intitled to hold all the land originally parcel of *Little Baldon* farm, and now veſted in her, free and exempt from payment of any tithes to the plaintiff, for the reaſons above mentioned.

The defendant Dr. *Bacon* diſclaimed any right to the tithes of hay, growing or ariſing on *Smith's Piece*, or *Forty Acres Piece*, they compoſing part of the ſaid ancient manor farm; the tithes whereof, ſo far as he

is intereſted therein, being covered by the ſaid *modus* or compoſition of fourteen pounds a year paid to the rector of *Marſh Baldon* for the time being.

The defendant Mrs. *Lane* ſaid, that the ſaid *William Cox*, who rented *Smith's Piece* of her, paid her, over and above his general rent, the yearly ſum of thirty ſhillings by a particular covenant in his leaſe, for ſaid *Smith's Piece*, and other lands held by him, part of the ſaid manor farm, as the proportion of the ſaid fourteen pounds a year, and in conſideration thereof, the defendant *William Cox* took to himſelf, under the ſaid leaſe, all the hay and other titheable matters, ariſing on the ſaid *Smith's Piece* (ſave the plaintiff's proportion of one fifteenth of the corn tithe thereof) without ſetting out any tithes thereof, or making any ſatisfaction to any perſon for the ſame, except the ſaid thirty ſhillings a year; and the defendant Dr. *Bacon* inſiſted, that he having been lawfully preſented, inſtituted, and inducted into the ſaid rectory of *Marſh Baldon*, did thereby become rector thereof, and as ſuch intitled to the ſaid *modus* or compoſition of fourteen pounds a year, paid for the tithe of the manor farm, and particularly to all the hay tithes, ariſing within the ſaid pariſh (ſave the hay tithes of certain lands, called *Durham Leas* and *Spindlers*, held by the plaintiff under *Queen's College*, *Oxford*) and in general to all tithes whatſoever ariſing within the ſaid pariſh, except ſuch parts or portions of the ſaid great tithes, as have been uſually held and enjoyed by the plaintiff, and thoſe under whom he claims; and that ſuppoſing *Marſh Baldon* to be a chapel endowed (which he by no means admitted it to be) he has a right to preſcribe, as againſt the plaintiff; for what this defendant's predeceſſors and himſelf have been in the poſſeſſion of, for fifty years laſt

laſt paſt, and that the plaintiff is to be conſidered, as to the tithes in queſtion, as grantee only, claiming under the before-mentioned grant of the year 1626, and that the impropriation of all the tithes excepted and reſerved thereout either remained in the ſaid *Lewis Pollard*, or veſted with the rectory of *Marſh Baldon*, as an endowment from him; the benefit of all which the ſaid defendant Dr. *Bacon* inſiſted upon, and that he is not to be affected by any general terms made uſe of in that conveyance; but the ſaid defendants admitted, that the plaintiff is intitled to ſuch portion or portions of tithes, but theſe varying as well in *ſpecies* as in quantity, in different lands in the ſaid pariſh, and in ſuch particular lands only as the plaintiff, and thoſe under whom he claims, has, and have, for time immemorial enjoyed the ſame.

Anſwer of *William Cox* (the tenant) to the original bill in *Eaſter* Term, 1762.

To the plaintiff's original bill the defendant *William Cox* (againſt whom the ſame was originally brought for the hay tithes of *Smith's Piece* only, but afterwards enlarged for tithes of other lands) put in his anſwer, whereby he admitted, that the pariſh of *Marſh Baldon* contains, beſides the townſhip of *Marſh Baldon*, a townſhip or hamlet, called *Toot Baldon*, and another townſhip or hamlet called *Little Baldon*, but that the rector of the pariſh of *Marſh Baldon* was, and beyond the time of memory had been, a rectory preſentative, and that Mrs. *Lane*, as owner of the manor of *Marſh Baldon*, many years ago preſented the other defendant Dr. *Bacon* to the ſaid rectory, and that he was thereupon inſtituted and inducted thereto.

He admitted there is a parcel of meadow or paſture land in *Marſh Baldon* called *Smith's Piece*, of which he was in poſſeſſion, but did not believe that the

plaintiff is intitled to the tithes and tenths in kind, of all or any hay yearly ariſing therefrom, after the rate of one cock in fifteen (as claimed by his original bill) or of any other proportion, or to any annual pecuniary payment in lieu thereof; but, on the contrary, that the defendant Dr. *Bacon*, and his predeceſſors, rectors of *Marſh Baldon*, were, and always had been intitled to all tithes, both great and ſmall, ariſing on the demeſne lands of the manor of *Marſh Baldon*, or ſome compoſition or pecuniary payment in lieu thereof; that there is a farm in the ſaid pariſh, called the *Manor Farm*, part of the demeſne lands of the ſaid manor, and that an ancient compoſition of fourteen pounds a year had always been paid to the rectors of *Marſh Baldon*, in lieu of all tithes ariſing therefrom, and that *Smith's Piece* was reputed to be part of the ſaid manor farm; and that the ſaid payment of fourteen pounds a year had been reputed to be a compoſition, as well for tithes ariſing on ſaid *Smith's Piece* (as part of the ſaid manor farm) as upon the other lands belonging thereto.

That he firſt entered on the ſaid *Smith's Piece* in the year 1743, under a leaſe from the defendant Mrs. *Lane*, in which he covenanted to pay, and did pay thirty ſhillings yearly, as a proportionable part of the ſaid fourteen pounds a year, in lieu of the ſaid tithes ariſing on *Smith's Piece*; and afterwards had another leaſe ſubject to the ſame covenants; that during the hay harveſt, in the year 1700, *Joſeph Atherton* the plaintiff's tenant, entered into *Smith's Piece*, and by force took away ſeveral cocks as tithe hay, claimed to be due to the plaintiff, without any previous demand having been made of tithe, or notice to the defendant, of any intention of taking the ſame; upon which he brought an action of treſ-

paſs

paſs againſt the ſaid *Joſeph Atherton*, who ſuffered judgment to go by default.

The ſaid defendant *William Cox* dying on or about 1 *April* 1763, plaintiff brought a bill of revivor, and ſupplement againſt *Sarah Cox*, his ſiſter, and executrix, who in *Trinity* Term, 1764, put in an anſwer thereto, and thereby admitted aſſets of her ſaid late brother; and that ſhe had, ſince her brother's death, taken the tithe of hay upon the cloſe called *Battin's*, in the occupation of *John Arthur*, as having right ſo to do, as executrix of her ſaid brother, who, at the time of his death, rented all the tithes belonging to the rectory of *Marſh Baldon*, to whom the hay tithes of *Battin's* belonged; that in the year 1761, ſhe aſſiſted in taking away ſome tithe hay from *Burnt Houſe Cloſe*, alias *Hayes's* alias *Cheney's Cloſe*, for the uſe of her brother, who then rented the tithes of the rector of *Marſh Baldon*.

Sarah Cox put in an anſwer to the bill of revivor and ſupplement, in *Trinity* Term, 1764.

Exceptions having been taken by the plaintiff to the ſaid anſwer, the ſaid defendant *Sarah Cox* put in a further anſwer to the plaintiff's bill, whereby ſhe admitted that the cattle of ſeveral occupiers of farms in all the *Baldons* fed promiſcuouſly over the whole fields of *Baldon*, that the ſaid common was ſtinted; and admitted the plaintiff was, or would have been, intitled to the ſmall tithes, ariſing by the commoning in reſpect of the two yard-lands in *Toot Baldon* in the bill named, if the ſaid *William Cox* had ſtocked ſuch his common there, but ſhe believed he did not put any cattle to common there, in reſpect of his ſaid two yard-lands in the plaintiff's tilling, but that all the cattle which he commoned there, were put in for his lands or commons in and for *Marſh Baldon*.

Sarah Cox put in a further anſwer, 4 Jan. 1767.

them they produced furze; and that at the time of the plaintiff's filing his bill, the ſaid defendant cut two crofts therefrom, of which the plaintiff or his tenant took the tithes in kind before the defendant Dr. *Bacon* knew thereof; but that the defendant Dr. *Bacon* always received all the ſmall and privy tithes there; and the defendant admitted, that in the year 1760, he cut about one thouſand furze faggots therefrom.

Divers evidences and witneſſes were produced and examined on both ſides, whereby it appeared, on the part of the defendants, that the ſaid church of *Marſh Baldon* never was appropriated to the monaſtery of *Dorcheſter*, although *Toot Baldon* might have been ſo; that the abbot of *Dorcheſter* never interfered therein, but in one inſtance in the year 1368, when he acted in his capacity of archdeacon of *Dorcheſter* only, upon being wrote to by the then Biſhop of *Lincoln*, to admit *Patrick Sweyne* to the church of *Marſh Baldon*, (*ad eccleſiam de Mers Baldyndon*) and inſtitute him rector thereof, which he certified that he did accordingly as archdeacon; and that the ſame was done by the abbot, as official only to the biſhop, appeared from another inſtance in the year 1381, when a like return was made by the abbot of the monaſtery of *Oſeney* as archdeacon of *Dorcheſter*, to a mandate of the then Biſhop of *Lincoln*, whereby he certified, that he had inſtituted *Thomas de Thornton*, who had been preſented by *Peter de la Mere* to the ſame church, (*ad eccleſiam de Meres Baldyndon*), that from the year 1209 to the year 1539, when the greater monaſteries were diſſolved (of which *Dorcheſter* was one), and down to the year 1735, when the preſent incumbent was inſtituted, and particularly at the time of the diſſolution of monaſteries, the advowſon was uninterruptedly in LAY HANDS; for that in the year 1533, which was ſix years

years only before the diſſolution, the ſame was preſented to by the truſtees *(recuperatores)* of Lord *Windſor*; and in 1 *Edw. VI.* (1547) which was fourteen years after, Lord *Windſor* granted a leaſe of the manor of *Marſh Baldyndon*, and the patron's acre, and the advowſon of the ſaid church; that although there were ſome inſtances between the year 1209, and 1361, of the ſame having been preſented to as a chapel, yet moſt of the inſtitutions are as rector; and it appeared that in thoſe ages the term church or chapel were deemed ſynonimous, for that in the year 1371, *Marſh Baldon* was preſented to as a church, and in 1372, as a church or chapel; and that in a deed of exchange, made in the year 1370, between *John Hadeſtall* who is therein ſtyled *rector eccleſiæ de Mers Baldyndon*, with *John Dagat*, the vicar of *Saint Nicholas*, *Abingdon*, the latter is ſtyled vicar of the pariſh church or chapel of *Saint Nicholas* in *Abingdon*; that from the year 1465, down to the preſent time (about three hundred years) the ſaid living had been uniformly preſented to as a rectory and pariſh church; that in the crown ſurvey taken 26 *Hen. VIII.* about four years before the diſſolution of the greater monaſteries, *Marſh Baldon* is called a rectory, and *John Hutchinſon* the rector thereof, and that as ſuch it is charged to the firſt fruits and tenths; that in the year 1626, when *Lewis Pollard* ſold to Mr. *Jennens* the impropriate rectory of *Toot Baldon* (under whom the plaintiff claims) the manor and rectory of *Marſh Baldon* was in *John D'Anvers*, and did not come into the family of the *Pollards* till 1635; (being nine years after). Upon the marriage of *John Pollard*, the ſon of the ſaid *Lewis*, with *Suſan D'Anvers* the heireſs of the *D'Anvers*, the anceſter of Mrs. *Lane*; it was fully proved by depoſition, that *Marſh Baldon* and *Toot Baldon* are conſidered as diſtinct manors, the firſt belonged to Mrs.

Mrs. *Lane*, the laſt to *Queen's College, Oxford*; that each has a church of its own, that *Marſh Baldon* enjoys the adminiſtration of the ſacraments and ſepulture, keeps its own poor, and has all other marks of a pariſh; and there was a good deal of evidence to ſhew that Dr. *Bacon*, or his tenant, has uniformly taken the hay tithes, and other the tithes, which the plaintiff now claims; on the other hand, there was ſome parol evidence, on the plaintiff's part, to controvert Dr. *Bacon's* right thereto.

Bill diſmiſſed 13 Dec. 1770.

This cauſe came on to be heard before the barons of his Majeſty's court of *Exchequer*, at *Weſtminſter*, 26 *November*, and continued hearing 10, 11, 12, and 13 *December*, 1770, on the laſt of which days the court was pleaſed to order and decree, that the original and amended bills, bill of revivor, and ſupplemental bill filed by the plaintiff, ſhould be diſmiſſed out of the ſaid court, with coſts.

See this cauſe on rehearing under Michaelmas *Term*, 13 Geo. III. *and on appeal, under* Hilary 14 Geo. III.

Michaelmas

Michaelmas Term, 13 Geo. III.

November 26, A. D. 1772.

In the *Exchequer*.

* Sir *Sidney Stafford Smythe*, Lord Chief Baron.
Sir *Richard Adams*.
George Perrott.
Sir *James Eyre*.

* Extracted from "The *Nomenclature* of *Weſtminſter Hall*," at the end of "The Biographical Hiſtory of Sir *William Blackſtone*," octavo edit. 1782.

Edward Thurlow, Attorney General.
Alexander Wedderburn, Solicitor General.
John Glynn, Serjeant at Law, Recorder of *London*.

Francis Yateman, ——— Plaintiff.

Sarah Cox, *Phanuel Bacon*, D. D. *Jonathan Martin*, and *Chriſtopher Willoughby* (ſole executor and deviſor of the laſt will and teſtament of *Elizabeth Lane*, widow, deceaſed), and *Thomas Cawley* her heir at law, } Defendants.

*** *Extracted from the caſe of the reſpondents among the the printed caſes of appeal.*

Cauſe revived and reheard.

THE plaintiff, conceiving himſelf aggrieved, ſo far as concerned the diſmiſſion of his ſaid bill with coſts, obtained an order for a rehearing; but in the mean time the ſaid *Elizabeth Lane* departed this life, leaving the defendant *Thomas Cawley*, her heir

heir at law, and *Chriſtopher Willoughby*, her deviſor, and ſole executor; whereupon the plaintiff revived the ſaid original cauſe, and the ſame came on to be reheard before the barons of the ſaid court of *Exchequer*, on 2, 6, 18, and 20 *July*, 1772, on which laſt mentioned day the court were pleaſed to order the ſame to ſtand over for judgment to the ſecond day of cauſes in the then *Michaelmas* Term; and on 26 *Novem.* 1772, the barons were pleaſed to affirm their ſaid former decree.

See this cauſe originally heard under *Michaelmas* Term, 11 *Geo.* III. and on appeal, under *Hilary* Term, 14 *Geo.* III.

December 14, A. D. 1772.

In the *Exchequer*.

John Bree, Clerk, —— Plaintiff.

Charles Chaplin, Eſq; —— Defendant.

*** *The caſe of the plaintiff, as ſtated by his own pleadings, extracted from the printed caſes of appeal, delivered to the Lords, counſel, and parties concerned, previous to the hearing, with the manuſcript judgments of the Houſe, indorſed thereon.*

In *Hilary* Term, 1769, the plaintiff exhibited his bill in the court of *Exchequer*.

IN *Hilary* Term 1769, the plaintiff exhibited his bill of complaint in his Majeſty's court of *Exchequer*, as rector of the pariſh of *Ryſom*, in the county of *Lincoln* againſt the defendant, ſetting forth, that ſince the inſtitution and induction of the plaintiff into the ſaid rectory, the defendant had been owner and occupier of all the lands in the ſaid pariſh, to the amount

amount of two thouſand acres, and that in the years 1767 and 1768, he had divers titheable matters and things ariſing and growing on the ſaid lands, the tithes whereof became due, and ought to have been paid to the plaintiff; it was therefore prayed, that the defendant might be decreed to account with him, for the value of the ſaid titheable matters and things, and might pay what ſhould appear to be due on taking ſuch account. Prayer of bill.

The defendant, by his anſwer to the ſaid bill, admitted that he was, during the time mentioned in the bill, ſole occupier and owner of all the lands in the ſaid pariſh; and that he was alſo the ſole owner and occupier of another tract of land adjoining to *Ryſom* called *Grange de Lynge*, and inſiſted, that the ſaid tract of land, called *Grange de Lynge*, or any part thereof, was not in the pariſh of *Ryſom*, and further inſiſted, that ſome ancient compoſition real, was made before the reign of Queen *Elizabeth*, by and between the parſon, patron, and ordinary of the ſaid pariſh, by virtue whereof the payment of fifteen pounds, ten ſhillings, and one penny half penny, was in lieu and full ſatisfaction of all tithes and other eccleſiaſtical dues, yearly payable from all the lands within the ſaid pariſh of *Ryſom*, and the titheable places thereof, except *Grange de Lynge* aforeſaid. Defendant's anſwer.

The ſaid cauſe being at iſſue, witneſſes examined, and publication paſſed, came on to be heard before the barons of the court of *Exchequer* on 12 and 14 *Decem.* 1772, when it was ordered by the ſaid court, that the two iſſues herein after mentioned, ſhould be tried at law in a feigned action, to be brought for that purpoſe in the office of pleas of the ſaid court, with the uſual directions. Cauſe heard, and iſſues directed.

The

Trial thereon.

The ſaid two iſſues came on to be tried at *Lincoln*, before Mr. Juſtice * *Blackſtone*, on 25 & 26 *March*, 1774.

Firſt iſſue.

The firſt iſſue which lay on the plaintiff to maintain, was, that the lands called *Grange de Lynge*, in *Lincolnſhire*, were in the pariſh of *Ryſom*, in the ſaid county.

Plaintiff's proof as to this iſſue.

To ſupport this firſt iſſue, amongſt other evidence, the plaintiff produced an examined copy of a grant, dated 30 *September*, 30 *Hen.* VIII. whereby the King granted to the Duke of *Suffolk*, and his heirs for ever, all the farm at *Grange*, called *Lynges Grange*, otherwiſe the *Grange* of *Lynges*, with the appurtenances, in the ſaid county of *Lincoln*, to the late monaſtery of *Barlings* belonging or appertaining, together with all meſſuages, lands, &c. with their appurtenances in *Lynges*, within the pariſh of *Ryſom*, and in *Swinthorpe* within the pariſh of *Snelland*, in the ſaid county of *Lincoln*; and in another part of the ſame grant, mention was made of all that the manor or lordſhip of *Ryſom* and *Ryſom Grange*, &c. to hold to the ſaid Duke of *Suffolk*, and the heirs of his body for ever: the plaintiff then produced a deed, dated 4 *May*, 3 *Eliz.* which was a bargain and ſale, whereby *William* and *Anthony Stokes* did bargain and ſell to *Thomas Saint Poll*, all that the manor of *Ryſom*, with the appurtenances, in the county of *Lincoln*; and alſo, all thoſe meſſuages, granges, &c. in the pariſh, town, and fields of *Ryſom*, in as large a manner as the Duke of *Suffolk* held the ſame. The plaintiff produced evidence to ſhew *Grange de Lyng*, had always been rated to the land

* See the Biographical Hiſtory of Sir *William Blackſtone*, *Octavo*, 1782.

and

and window tax, as in the parish of *Ryfom*. And in order to shew the accuracy of the said letters patent of 30 *Hen.* VIII. *Richard Good*, a witness examined for the plaintiff, proved *Swinthorpe* was in the parish of *Snelland*, and paid all parish rates as such.

On the part of the defendant, several grants and deeds were produced, which only confirmed what had been proved on the part of the plaintiff; by the deed of 30 *Septem.* 30 *Hen.* VIII. that the lands called *Grange de Lynge*, granted to the Duke of *Suffolk* in fee, were distinct from the manor or lordship of *Ryfom* and *Ryfom Grange*, granted in the same deed to the said Duke of *Suffolk* in tail. Defendant's proofs on first issue.

The defendant also produced in evidence, a certificate of *Witham* Bishop of *Lincoln*, to the governers of Queen *Anne*'s bounty (the date not specified) of the clear yearly value of the rectory of *Ryfom*, therein mentioned to be fifteen pounds, and that it had no church, and but one family.

William Durant, a witness examined for the defendant, proved, that when he first knew *Ryfom* and *Grange de Lynge*, there was but one family belonging to them, afterwards there were two.

The learned judge, who tried the cause, summed up the evidence, and after observing thereon, informed the jury, that if, upon the whole they thought that *Grange de Lynge* was in the parish of *Ryfom*, in 30 *Hen.* VIII. they should find a verdict for the plaintiff; but, notwithstanding the said evidence given on the part of the plaintiff, they found a verdict for the defendant on this issue. Verdict on first issue.

The next morning, 26 *May*, 1774, the second issue was tried.

The

Second iſſue.

The ſecond iſſue, of which the defendant maintained the affirmative, was, that ſome ancient lawful and valid compoſition real was made, before the reign of Queen *Elizabeth*, by and between the parſon, patron, and ordinary of the ſaid pariſh of *Ryſom*, by virtue whereof, a certain ancient payment of fifteen pounds, ten ſhillings, and three half pence, to wit, fifteen pounds in money, was made payable half-yearly, on *Lady-day* and *Michaelmas*, to the rector of the ſaid pariſh, for the time being, and ten ſhillings and one penny half-penny, the ſaid reſidue, was to be paid to the archdeacon of *Stowe*, within the dioceſe of the Biſhop of *Lincoln*, for procurations and ſynodals yearly; and that ſuch payments had been made from ancient times, before the reign of Queen *Elizabeth*, to wit, from the time of making ſuch real compoſition for all the lands within the ſaid pariſh, except the ſaid lands called *Grange de Lynge*, in lieu and full compenſation of all tithes whatſoever, *&c.* and other eccleſiaſtical dues, *&c.* yearly ariſing, and payable upon, or from all the lands, within the ſaid pariſh, or belonging to the ſaid ancient rectory; and that the ſaid ancient payment of fifteen pounds hath been conſtantly and regularly paid, *&c.*

Defendant's proofs on ſecond iſſue.

To prove this iſſue, the counſel for the *defendant*, produced the ſaid certificate of the Biſhop of *Lincoln*, in the reign of Queen *Anne*, which was read in evidence, the day before ſtating the value of *Ryſom* rectory to be fifteen pounds a year, in the reign of Queen *Anne*, and proved regular payments of that ſum, and of the ten ſhillings and one penny half-penny, for the greateſt part of the period of time, from 1706, to 1766, all which was admitted by the plaintiff; but he inſiſted, that ſuch payment of fifteen

fifteen pounds, ten ſhillings, and a penny half-penny, was a temporary compoſition, made by Mr. *Mills*, the rector, in the reign of Queen *Anne*, at which time it was the full value of the tithes of *Ryſom* pariſh, including *Grange de Lynge*, and that formerly the value was much leſs; and conſequently, that this ſum could not poſſibly have been a real compoſition, exiſting from the time of *Philip* and *Mary*, as affirmed by the defendant.

Plaintiff's proofs on ſecond iſſue.

The plaintiff on his part produced an extract from the parliamentary ſurvey, 26 *Hen.* VIII. in which the return ſtates the rectory of *Ryſom* to be of the value of four pounds.

Several ſubſidy books in 1624, and downward for eccleſiaſtical ſubſidies, in which *Ryſom* was there charged at eight ſhillings, and ſeven ſhillings and two pence; ſeven ſhillings and two pence half penny, being the tenth part or ſubſidy of two ſhillings in the pound, or the clear yearly value at four pounds.

A terrier of the lands appertaining to *Ryſom* parſonage, was then produced from the regiſter of the Biſhop of *Lincoln*, dated 1601, wherein no tithes are mentioned, nor any compoſition in lieu of tithes.

A paper book proved to have been written in 1599, was next produced out of the ſame regiſter, purporting to be a return to ſome articles of inquiry, relating to the eccleſiaſtical ſtate of the ſeveral pariſhes within the archdeaconry of *Stowe* and *Lincoln*, by which it appears, that the value of *Ryſom* rectory was ten pounds; and in order to prove, that in the reign of Queen *Anne*, when the biſhop's certificate

to the governors of Queen *Anne*'s bounty was made, and when the firſt evidence of the preſent payments commenced, the ſum of fifteen pounds, ten ſhillings, and one penny halfpenny, was more than equivalent to the value of tithes in *Ryſom*, including *Grange de Lynge*, the plaintiff produced in evidence the account of the ſteward's annual receipts, from the evidence room at *Bolton*; amongſt others, there is this article, Mr. *Law* for *Ryſom* fifty-two pounds, the ſame, *Grange de Lynge*, eighteen pounds, total ſeventy-five pounds; and another entry to the ſame effect, for half a year ending at *Michaelmas*.

Obſervations on the evidence on the ſecond iſſue.

This ſecond iſſue ſeemed to be framed on the ſuppoſition, that the firſt iſſue would be found for the plaintiff, and as the jury had found the firſt iſſue for the defendant, it was impoſſible they could alſo find the affirmative of the ſecond iſſue in the terms in which it was laid, for if *Grange de Lynge* was no part of the pariſh of *Ryſom*, there could not have been a real compoſition, for all the lands within that pariſh, excepting the lands called *Grange de Lynge*, ſuch exception implying them to be within the pariſh; the evidence of the payment of fifteen pounds a year, went no higher than the reign of Queen *Anne*: now the mere proof of payment from the reign of Queen *Anne*, to the time of filing the plaintiff's bill, was not ſufficient evidence of a real compoſition, made in the reign of *Philip* and *Mary*, ſo that, upon the defendant's own evidence, the jury ought to have found a verdict for the plaintiff, and there was no evidence of the payment contended for by the defendant, prior to the time of Mr. *Mills*, who was rector about forty years, and probably at that time, made an advantageous bargain for the rector, but the jury after a ſhort abſence, found a general verdict for the defendant.

Verdict on ſecond iſſue.

The

The plaintiff thinking himſelf aggrieved by theſe verdicts, on 20th *April*, 1774, applied to the court of *Exchequer*, praying that a new trial of the ſaid iſſues might be granted, and on 11th *May*, being the day appointed for the defendant to ſhew cauſe, the report of Mr. Juſtice *Blackſtone* was read, and counſel were heard on behalf of the defendant, and the ſaid motion was adjourned to the 13th, when after hearing counſel farther for the defendant, and alſo counſel for the plaintiff, the ſaid motion was adjourned over for the opinion of the court to the 16th, and on that day the ſaid court thought fit to order, that a new trial ſhould be had of the ſaid iſſues.

Plaintiff applies to the court of *Exchequer*, for a new trial

And ſame was granted.

*** *The defendant's caſe, as ſtated by his own pleadings, extracted from the printed caſes of appeal, delivered to the Lords, counſel, and parties concerned, previous to the hearing, with the manuſcript judgments of the Houſe indorſed thereon.*

Sir *John Brownlow* of *Belton*, in the county of *Lincoln*, Baronet, died ſeiſed, amongſt other real eſtates, of an eſtate at *Ryſolm* and at *Grange de Lyngs*, in the ſaid county; after his death his widow dame *Alice Brownlow* was in poſſeſſion of the ſaid eſtates, till the year 1714, when, in conſequence of an act of parliament for veſting all the real eſtates of the ſaid Sir *John Brownlow* in truſtees, to be ſold, for the purpoſes therein mentioned, the ſaid eſtates at *Ryſolm* and *Grange de Lyngs* were conveyed to the then Sir *John Brownlow*, Baronet, afterwards Lord Viſcount *Tyrconnel* of the kingdom of *Ireland*; of whom, in the year 1721, the ſaid eſtates were purchaſed by *Thomas Chaplin*, Eſq; the defendant's father.

The ſaid *Thomas Chaplin* died ſeiſed of the ſaid eſtates, and from that time the defendant hath been in poſſeſſion. 1747.

The defendant's father, at the time of purchaſing the ſaid eſtates, was particularly careful to aſcertain the out-goings from them, which were by agreement to be allowed for by a draw-back from the purchaſe money, according to the price which he had given for the eſtate; and after an examination of the ſeveral deeds, accounts, and vouchers, then in Lord *Tyrconnel's* poſſeſſion, an account of the annual out-goings was made out, and a drawback out of the purchaſe money was repaid according to the agreement; in the ſaid account of the annual out-goings were contained the following articles, *viz.*

		l.	*s.*	*d.*
To the Rector of *Ryſolm*	—	15	0	0
Procurations and ſynodals	—	0	10	1½

From the year 1721, the ſaid outgoings were regularly and uniformly paid by the defendant's father, and ſince his death by the defendant, till the year 1767, when the plaintiff, ſoon after his inſtitution to the ſaid rectory, claimed tithes in kind, inſtead of the ſaid yearly payments.

Though the plaintiff is called a rector, yet there has not been in *Ryſolm* any church, or place of public worſhip, nor any parſonage houſe, any reſident miniſter, nor any divine ſervice, within time of memory, if ever; the rectory (if it be properly ſo called) is an abſolute ſinecure; and it is not contended, that tithes in kind, or any other payments in lieu of tithes, but the above mentioned yearly payments, were ever received, or demanded, by any of the plaintiff's predeceſſors; it might however be preſumed, that the defendant would have great difficulties to encounter, in acquiring an accurate knowledge of the ſtate of the ſuppoſed rectory, beyond the

the time of his father's purchaſe of the ſaid eſtates; for the male line of the *Brownlow* family was extinct; the eſtate at *Belton*, where they reſided, had fallen to a collateral branch of the family; and it was improbable that any accounts ſhould be preſerved by that family of out-goings paid by former owners of an eſtate, of which they had been ſo long out of poſſeſſion; the preſumption ariſing from hence, that very ancient payments could not be eaſily proved, might encourage the plaintiff to ſet up a claim, *in the firſt inſtance*, to the tithes of an eſtate, which, ſince the purchaſe by the defendant's father, had been conſiderably improved; but yet the unreaſonableneſs of the claim muſt have been apparent.

By the ſtatute of Queen *Anne*, for diſcharging ſmall livings from the firſt fruits and tenths, the biſhops of every dioceſe are required to inform themſelves, *as well by oath, as by all other lawful ways and means*, of the improved yearly value of every benefice, under the yearly value of fifty pounds, and it is expreſsly enacted, that the certificate of the biſhop ſhall *aſcertain* the clear yearly value of the benefice; under the directions of this ſtatute *Ryſolm* was certified by the biſhop to be of the *clear yearly value of fifteen pounds*. It has ſince been augmented by Queen *Anne*'s bounty, and the plaintiff, from the time of the inſtitution, has received the benefit of ſuch augmentation. The biſhop had certified the value of the living, into the firſt fruits office, but ſeven years before Lord *Tyrconnel* purchaſed the eſtate; which had been long enjoyed by his anceſtors; he had therefore every opportunity of knowing the value of the living; and as the certified value correſponded with the cuſtomary payment to the rector, no purchaſer in the ſituation of the defendant's father could require a greater ſecurity. When he made the purchaſe, intel-

5 *Anne*, chap. 14.

ligence was ſent to the patrons of the living, that improvements of the eſtate were talked of, and that if tithes in kind could be had, the advowſon would be valuable. This intelligence is in the plaintiff's cuſtody, and the conſtant acquieſcence in the ancient payment ever ſince, notwithſtanding the improvements, is ſtrong evidence that the certified value was unalterable; on the faith and credit of the value of the living ſo *aſcertained* by parliamentary authority, and confirmed by certain uniform payments, improvements of the ſaid eſtate have been made; on the ſame faith and credit the defendant entered into covenants in his marriage ſettlement, and many purchaſers for a valuable conſideration would be ſubſtantially prejudiced, if the value at this diſtance of time is to be altered, and the remedy is to be traced back againſt the heirs at law of *Sir John Brownlow*, who died in the laſt century.

Notwithſtanding theſe circumſtances, the plaintiff, in *Hilary* Term 1769, exhibited a bill in the court of *Exchequer* againſt the defendant, ſetting forth, that about 2d *December* 1766, he was inſtituted and inducted into the rectory of *Ryſolm*, and thereby became intitled to all manner of tithes, oblations, obventions, and other eccleſiaſtical dues whatſoever, within the ſaid pariſh and titheable parts thereof; and the defendant was owner and occupier of all the lands within the ſaid pariſh, to the amount of two thouſand acres and upwards; and that the ſaid lands were of the *yearly value* of ſeven hundred pounds, and the ſaid bill prayed an account of the value of the titheable matters, in the years 1767 and 1768, and payment of what ſhould appear to be due on taking the account.

The

The ſaid bill was afterwards amended, but contained no allegation, that tithes in kind had been ever paid or demanded; nor was the circumſtance of the augmentation of the ſaid living by Queen *Anne*'s bounty diſcloſed by the ſaid bill, although it appeared from the plaintiff's allegations, that tithes in kind would encreaſe the value of this living beyond the value of any of the livings, which were intended by the parliament to have the benefit of ſuch augmentation.

The defendant, by his anſwers to the ſaid bill, admitted, that he was the ſole owner and occupier of all the lands in *Ryſolm*, and ſaid, that he was alſo the ſole owner and occupier of another tract of land adjoining to *Ryſolm*, called *Grange de Lyngs*; but that the lands in *Ryſolm* contained only ſix hundred and ſeventy one acres, or thereabouts, and that the lands called *Grange de Lyngs*, contained ſeven hundred and fifty nine acres, or thereabouts; and he inſiſted, that the ſaid tract of land called *Grange de Lyngs*, or any part thereof, was not in the ſaid pariſh of *Ryſolm*, and ſubmitted to the court, that, if it was within the ſaid pariſh, it was exempt from tithes, and was parcel of a diſſolved monaſtery, and belonged to a religious order; and as to the lands within the ſaid pariſh, the defendant inſiſted, that ſome ancient, lawful, and valid compoſition real was made before the reign of Queen *Elizabeth*, by and between the parſon, patron, and ordinary of the ſaid pariſh, by virtue whereof a certain ancient payment of fifteen pounds, ten ſhillings, and one penny half-penny, to wit, fifteen pounds in money, was made payable half yearly at *Lady-day* and *Michaelmas* in each year, to the rector of the ſaid pariſh for the time being, and ten ſhillings and three half-pence, reſidue of the ſaid fifteen pounds, ten ſhillings, and one

penny half-penny, was to be paid to the archdeacon of *Stowe*, within the dioceſe of the Biſhop of *Lincoln*, for procurations and ſynodals yearly, and which hath been paid from ancient time, before the reign of Queen *Elizabeth*, to wit, from the time of making ſuch real compoſition by the owner for the time being, of all the lands within the ſaid pariſh (except *Grange de Lyngs*) in lieu and full ſatisfaction of all tithes whatſoever, offerings, oblations, obventions, and other eccleſiaſtical dues, poſſeſſions, and rights whatſoever, yearly ariſing, renewing, increaſing, or payable upon or from all lands within the ſaid pariſh, or the titheable places thereof, or belonging to the ſaid rectory; and which ſaid ancient payment of fifteen pounds, hath been conſtantly and regularly paid, for a long ſeries of years, to *Michaelmas* 1766, to the rectors of the ſaid pariſh for the time being, or to ſome other perſon for their uſe, and by them the ſaid rectors (together with the payment of the ſaid ten ſhillings and three half-pence, in manner aforeſaid) received, taken, and accepted, during the time aforeſaid, in full ſatisfaction and in lieu of all tithes whatſoever, offerings, obventions, oblations, and other eccleſiaſtical dues, poſſeſſions and rights, yearly ariſing, renewing, or payable within the ſaid pariſh of *Ryſolm*, excluſive of *Grange de Lyngs* aforeſaid, and the titheable places thereof, or belonging to the ſaid rectory; and the defendant ſubmitted to the judgment of the court, that the ſaid annual payment was an effectual bar againſt any demand of tithes in kind, and believes it was ſo underſtood at the time of his father's treaty for the purchaſe of the ſaid eſtate; and that neither the plaintiff, or any of his predeceſſors, in the memory of any perſon living, had ever performed any religious duty within the ſaid pariſh.

The

The plaintiff replied to the anſwers, and divers witneſſes having been examined, and their depoſitions duly publiſhed, the cauſe came on to be heard before the Lord Chief Baron, Mr. Baron *Adams*, and Mr. Baron *Perrott*, on 12th and 14th *December*, 1772, when the court was pleaſed to obſerve, that the queſtion, whether *Grange de Lyngs* was in the pariſh of *Ryſelm* or not, was a queſtion of fact, proper for the determination of a jury, on an iſſue at law, which was not objected to by the counſel on either ſide; and as to the queſtion concerning the compoſition real, it was objected by the plaintiff's counſel, that the defendant ought not to be admitted to give any proof of it; but the production of the inſtrument under the hand and ſeal of the Biſhop, and the other parties; but this objection being overruled, a variety of evidence was produced on the part of the defendant, and the office copy from the firſt fruits office of the Biſhop's certificate, and ſome old accounts of Lady *Brownlow*'s ſteward, before the time of the ſaid certificate, and ſeveral vouchers to the ſaid accounts, which were caſually preſerved in the manſion houſe at *Belton*, and receipts for money paid to ſeveral ſucceſſive rectors, and for ſynodals and procurations, and a receipt for the outgoings which had been repaid by the ſaid Lord *Tyrconnel* out of the purchaſe money, and the depoſition of ſeveral witneſſes were read on the part of the defendant; but the plaintiff's caſe was reſted on objections to the rankneſs of the compoſition real, inſiſted on by the defendant, and the inſufficiency of the evidence in ſupport of it.

After arguments at the bar, the queſtion concerning the ſaid compoſition was thought proper for the determination of a jury, on another iſſue at law, but one of the barons at firſt declared his inclination

to

to diſmiſs the plaintiff's bill on this part of the caſe, but afterwards acquieſced in abiding the event of an iſſue at law, to which the former part of the caſe had been referred; and it having been declared by the court, that the *Lent Aſſizes* would be inconvenient for the trial of the iſſues, it was thereupon decreed, that it be referred to a trial at law, to be had upon the two following iſſues, to wit, Firſt, "*Whether* "*the lands called* GRANGE DE LYNGS *were in the* "*pariſh of* Ryſolm;" Secondly, "*Whether ſuch an-* "*cient, lawful, and valid compoſition real, was made* "*before the reign of Queen* ELIZABETH," (ſtating the ſame as in the defendant's anſwer); which ſaid ſeveral iſſues were directed to be tried in a feigned action, to be for that purpoſe brought, and that the plaintiff in the ſaid ſuit be plaintiff in the ſaid action at law, and that the defendant ſhould forthwith appear, and accept the declaration, and plead the *general* iſſue thereon, ſo that the ſaid iſſues might be tried at the then next ſummer aſſizes for the county of *Lincoln*, by a ſpecial jury of the ſaid county, and the conſideration of coſts, and all other directions, were thereby reſerved, till ſuch trial ſhould be had.

The two iſſues being ſettled conformably to the decree, no farther ſteps were taken, till 15th *July*, 1773, when the court had almoſt finiſhed their laſt ſittings, before the long vacation; and then the plaintiff having applied by motion, that certain exhibits might be produced by the defendant, the court made an order, "that all deeds, books, papers, and writings, relative to the matters in queſtion, in the cuſtody or power of either party, ſhould be forthwith produced on oath before the deputy remembrancer, with liberty to take copies reſpectively," after this order, the plaintiff gave notice of trial at the enſuing aſſizes.

On

On 17th *July*, the court varied the order, by directing the ſaid deeds, books, papers, and writings, to be produced at *Lincoln*, on or before 14th *Auguſt*, being the firſt day of the aſſizes.

On 19th *July*, the plaintiff countermanded the notice of trial, which he had given two days before, and did not proceed to try the iſſues.

On the firſt day of next *Michaelmas* Term, the plaintiff applied to the court by motion, to diſcharge that part of the order of 17th *July*, which related to the production of deeds, &c. at *Lincoln*, and that they ſhould be produced on oath, and left with the deputy remembrancer, on or before the firſt day of *Hilary* Term, for inſpection, and with liberty to take copies, and that the time for trying the iſſues might be enlarged to the then next aſſizes.

On the ſame day the defendant moved, that the iſſue might be taken *pro confeſſo* againſt the plaintiff, he not having proceeded to trial, as directed by the decree.

On 6th *November*, the two motions were heard together, when the court made an order for the production of all deeds, books, papers, and writings, before the deputy remembrancer, according to the plaintiff's application, and enlarged the time for the plaintiff to proceed to trial at law, till the next *Lent Aſſizes*.

Many variations were afterwards made in the order for production of papers and writings; and the plaintiff having left with the deputy remembrancer ten large *folio* manuſcript books of account, belonging

ing to the maſter and fellows of *Baliol College* in *Oxford*, (upon whoſe preſentation the plaintiff had been inſtituted to the ſaid ſinecure); which books it was impoſſible for the defendant, or his agents, to peruſe within the time allowed by the order for inſpection; therefore on 4th *February* following, the defendant applied to the court by motion, that the time for trial of the iſſue might be enlarged to the following ſummer aſſizes, which, at the time of the decree, was judged the moſt convenient ſeaſon of the year for ſuch trial; and that the plaintiff might point out ſuch parts of the ſaid manuſcript *folio* books as he intended to give in evidence, or otherwiſe, that the time for inſpection might be enlarged to the firſt day of the then next *Eaſter* Term; but the court denied the motion, and ordered the defendant to pay the coſts of the application.

The defendant having no intention to evade the trial of the ſaid iſſues, but truſting, that when they were tried, *the queſtions would be at an end*, acquieſced in the ſeveral orders, which the court had made on the plaintiff's application, notwithſtanding the unexpected denial of the laſt mentioned motion with coſts.

On 25th *March*, 1774, the iſſues came on to be tried, before Mr. Juſtice *Blackſtone* *, and a ſpecial jury of the county of *Lincoln*, and after ſome time ſpent on the trial of the firſt iſſue, it was propoſed by the judges, and agreed to by the counſel on both ſides, that the ſaid firſt iſſue ſhould be tried on that day, and that the trial of the ſecond iſſue ſhould be deferred to the day following: The trial laſted many hours on each day, and the jury, after withdrawing,

* See his "Biographical Hiſtory," *octavo*, 1782.

and

and taking time to conſider their verdict on each iſſue, found a verdict for the defendant on each of the ſaid iſſues.

On the firſt day of the next term, the plaintiff moved the court for a new trial of both the iſſues, and on the laſt day of the ſaid term, the report of Mr. Juſtice *Blackſtone* having been read, (in which he ſtated the evidence on both * ſides, without giving any opinion of the verdict on the firſt iſſue, but expreſſed himſelf in a manner, which imported his diſapprobation of the verdict on the ſecond iſſue) the court over-ruled it, that a new trial be had of the iſſues directed by the decree, at the next aſſizes for the county of *Lincoln*, by a ſpecial jury of the ſaid county, on payment of coſts to be taxed.

Order for a new trial granted, 16 *May*, 1774.

See this cauſe on appeal, under *Hilary* Term, 15 *Geo.* III.

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* See "Particular account of the evidence on the trial at law," *poſt*, p. 648.

Hilary Term, 14 Geo. III.

January 26, A. D. 1774.

In the Houſe of Lords.

Francis Yateman, — Appellant,

and

Sarah Cox, *Phanuel Bacon*, Doctor in Divinity, *Jonathan Martin*, *Chriſtopher Willoughby*, Eſq; Deviſee and Executor of *Elizabeth Lane*, Widow, who died between the two * Hearings of this Cauſe, and *Thomas Cawley*, Eſq; Heir at Law of the ſaid *Elizabeth Lane*, } Reſpondents.

The Appellant's Caſe †.

THE appellant conceiving himſelf much aggrieved by the court of *Exchequer* decreeing, that his bill ſhould be diſmiſſed with coſts, is adviſed to appeal to the Lords, and humbly prays, that the ſaid † decree may be reverſed, for the following

REASONS:

1. Becauſe it appears, from concluſive evidence, that the preſentations have not, from time immemorial, been to the rectory and pariſh church of *Marſh*

* *Vin.* under *Michaelmas* Term, 11 *Geo.* III. and under *Michaelmas* Term, 13 *Geo.* III.

† See this cauſe of the plaintiff, under *Michaelmas* Term, 11 *Geo.* III.

Baldon,

Baldon; but, on the contrary, for a long ſeries of years, within time of memory, the ſame hath been preſented to, by the name of a chapel, which was founded by ſome lord of the manor of *Marſh Baldon*, and by him endowed with a temporal revenue, and that *Dorceſter* is it's mother church.

2. For that it appears, that the rectory or ſpiritual profits of the whole peculiar of *Dorcheſter*, belonged to the church of *Dorcheſter*, as it's mother church, and that ſuch church of *Dorcheſter* is rated in reſpect thereof, in the taxation of ſpiritualities, *Anno* 1291.

3. That it appears, that the general name of *Baldon* includes all the ſeveral townſhips of *Baldon*, and that *Baldon*, including therein all ſuch townſhips, is parcel of the peculiar of *Dorcheſter*, and, as ſuch, parcel of the poſſeſſions of the ſaid monaſtery of *Dorcheſter*, at the time of it's diſſolution.

4. For that it appears, that on the diſſolution of the monaſtery of *Dorcheſter*, the crown granted the rectory or ſpiritual profits of *Baldon* generally, parcel of the ſpiritual profits of the church of *Dorcheſter*, to the perſon under whom the appellant claims, and that in a regular courſe of deſcent he is intitled thereto, except ſuch matters parcel thereof as are excepted thereout by *Lewis Pollard* in his conveyance to *Jennens*.

The Caſe of the Reſpondents *.

From which * ſaid decree, and affirmance thereof, the ſaid *Francis Yateman* hath appealed to the Lords,

* See the caſe of the defendants under *Michaelmas* Term, 11 *Geo.* III.

praying,

praying, that the ſame may be reverſed, and that he may be relieved in the premiſes; but the reſpondents humbly hope, that the ſaid original decree of diſmiſſion, and the ſubſequent one of affirmance, ſhall be affirmed for the following (among other)

REASONS:

1. The appellant, by claiming in his laſt amended bill, as general rector, has brought the queſtion between him and the reſpondents, to the ſingle point,

Whether Marſh Baldon *is a pariſh and rectory, or only a townſhip and chapelry?*"

Eccleſia defined.

It appears from the evidence, that it has been uniformly preſented to, by the name of a church (*eccleſia*, which ſignifies the parſonage with it's whole endowment) and the incumbent ſtiled rector from the year 1465 to the preſent time; and that it was conſidered as a church for a century before, now for a ſpace of four hundred years: the mode of preſentation proves this; for had it been a chapel, the patron would have preſented the clerk to the appropriators, and they would have admitted him; whereas it appears he was preſented to, and inſtituted by, the biſhop or his official: it has the characteriſtics of a pariſh church, in having baptiſm and ſepulture there is no proof, on the part of the appellant, of any ſubordination of it to *Toot Baldon*, as a mother church; no right to ſeats there; no contribution to the repairs thereof; no reſorting thither, as to a mother church, on ſtated days; no oblations paid; no oath of obedience to the rector or vicar as required by ancient * canons; it keeps it's own poor; ſtands in a different deanery; in fine, it is in no inſtance dependent thereon: the ſurvey of King *Henry*

* See *ante* 502, 504.

Henry the *Eighth*, and payment of firſt fruits and tenths, is deciſive evidence on this point.

2. But the appellant inſiſts, that becauſe it appears to have been preſented to as a chapel from the year 1209 to 1320, (which is within the legal time of memory) it could never afterwards gain the right of a church; and that it was penſionary to the church of *Dorcheſter*, in a pound of frankincenſe, which ſhewed it to be ſubordinate thereto. To this it is ſubmitted, that the abſolute diſtribution of pariſhes, as they are now, was not at that time fixed; that in thoſe ages the terms church and chapel were ſynonimous; that a *quare impedit* lay for a chapel, as well as a church, before the year 1285; that a church may be preſented to, as a chapel, and yet remain in right a church; and, on the other hand, a chapel may commence a church by being preſented and inſtituted as ſuch; and that no argument can be drawn from any ſuch penſion; or that may be payable, without inferring ſubordination, from church to church, abbey to abbey, by decree, agreement, gift, or deed.

3. The appellant claims this rectory of *Marſh Baldon* as included in the grant from the crown in King *Henry* the *Eighth*'s time, by the general deſcription of "the rectory of *Baldon*, late parcel of the monaſtery of *Dorcheſter*." This may be applicable to the rectory of *Toot Baldon*, which was appropriated to that monaſtery, but can by no means include *Marſh Baldon*, which, it is clear, never was appropriated to that, or any other eccleſiaſtical body, but remained in lay hands from the year 1272, to the preſent time; nor could *Lewis Pollard*, by his grant to *James Jennens* in 1626, by any amplified words

or deſcription, paſs more than what was included in the original grant from the crown, or affect the rector's right: beſides, it appears *Lewis Pollard* never had any eſtate or intereſt in the manor or advowſon of *Marſh Baldon*, and that the ſame did not come into his family, till the year 1636, (ten years after that grant) upon the marriage of his ſon *John Pollard*, with the heireſs of the *D'Anvers*. Had the appellant been rector, he would not have been contented with taking only one fifteenth of the corn tithes, when he was intitled to one tenth.

4. As to the ſmaller queſtions of right claimed by the appellant to the hay tithes, or *Smith's Piece*, and other pieces, or the tithe of the commons, or the furze, they are in this cauſe now abſorbed in the great queſtion of RECTOR; and if the appellant can ſupport any claim thereto reſpectively, it muſt be by ſome other means than the preſent ſuit.

January 26, 1774.

Appeal diſmiſſed, and decree and order affirmed.

Ordered and decreed, that the appeal be diſmiſſed, and that the decree and order complained of, be affirmed.

See this cauſe, under *Michaelmas* Term, 11 and 13 *Geo.* III.

Hilary

Hilary Term, 15 Geo. III.

March 8, A. D. 1775.

In the *Houſe* of *Lords*.

Charles Chaplin, Eſq; —— Appellant.

John Bree, Clerk, —— Reſpondent.

The Appellant's * Caſe.

THE appellant conceiving himſelf aggrieved by the order of the court of *Exchequer*, dated 16 *May*, 1774, appealed from the ſame to the lords; and in order to enable himſelf to lay before their lordſhips the ground of the ſaid order, from which he appealed, he afterwards, on 22 *June*, 1774, applied by motion, to the court of *Exchequer*, for a copy of Mr. Juſtice † *Blackſtone*'s report; but as the court did not think proper to comply with the ſaid application, the appellant is deprived of an opportunity of ſtating the evidence given on the trial of the ſaid iſſues ſo authentically, as he would otherwiſe have done; but humbly hopes, that the ſaid order of 16 *May*, 1774, ſhall be reverſed, or varied, for the following (among other)

REASONS:

1. The ancient and invariable payment of a certain ſum of money in lieu of tithes, which was

* See the plaintiff's caſe in this cauſe, under *Michaelmas* Term, 13 *Geo.* III.

† See his "Biographical Hiſtory."

proved in the cauſe, without contradiction, and without any proof, tradition, or even allegation, that tithes were ever paid or demanded in former times, was ſo ſtrong an objection to the reſpondent's claim, that on his refuſal to proceed to trial at the time expreſsly directed by the decree, the iſſues might have been taken *pro confeſſo* againſt him; he had every indulgence which could reaſonably be expected, and after a fair and impartial trial, he ought to have acquieſced in the verdict; a further litigation at law may anſwer the purpoſe of vexation and expence, but cannot be deſired from motives of juſtice.

2. If there had not been any unfavourable circumſtance in the reſpondent's application, a new trial of either of the iſſues could not be ſupported on any of the grounds, on which courts of equity have ever granted new trials; there is no imputation on the characters of the juries, nor any charge of partiality againſt any of them; it has not been contended, that the verdict is againſt law, or that it was founded on facts, which were contradicted, or that any new evidence has been diſcovered, or can be expected.

Objection.

The objection to the verdict, and the ſole ground inſiſted on, for ſetting it aſide, that it is contrary to the opinion of the judge, who tried the cauſe, and who appears, by his report, to have been diſſatisfied with it.

Firſt Anſwer.

This objection cannot affect the verdict on the firſt iſſue, with which the judge did not expreſs any diſſatisfaction, and as to the ſecond iſſue, the objection

jection is immaterial from two conſiderations, *Firſt*, from the nature of the queſtion before the jury, and *Secondly*, from the decree in the cauſe.

1*ſt*, The queſtion did not depend on various and contradictory evidence, but on facts, neither contradicted by witneſſes, nor denied by either of the parties in the cauſe; the inference and preſumption from thoſe facts was the only queſtion before the jury, and they are the only proper judges of it; if in ſuch a caſe the opinion of a judge differing from a jury is a ground for a new trial, there muſt be a failure of juſtice; for the order for a new trial amounts to a declaration of the court, that the former jury drew a wrong concluſion from the facts before them, which is, in other words, a *direction* to the new jury what verdict they muſt find on the ſame facts.

2*dly*, The evidence before the judge at the aſſizes, had been previouſly conſidered at the hearing of the cauſe by competent judges of every queſtion, within the province of a judge; the court directed the iſſue for the purpoſe of taking the ſenſe of a jury, which direction would have been nugatory, if the ſenſe of a jury was to be over-ruled by the opinion of a judge; on this ground of objection, the order for a new trial is inconſiſtent with the decree.

Second Anſwer.

There was not, in fact, any ground for the judge's diſſatisfaction with the verdict on either of the iſſues. *As to the firſt iſſue*; the reſpondent undertook to prove, that the lands called *Grange de Lynge*, were in the pariſh of *Ryſolm*, but he did not offer any of the legal proof, uſually required, of ſuch a fact;

he gave no evidence of perambulation, payment of parochial rates, or ſervice of parochial offices; the whole of his evidence, which was left by the judge to the conſideration of the jury, reſted on a ſingle deed; and if a deſcription in a deed is concluſive evidence of the extent of a pariſh (which is not admitted) the whole aroſe from conjecture that a parcel of land, deſcribed in the deed, by the name of *Lynge, within the pariſh of* RYSOLM, muſt neceſſarily mean *Grange de Lynge*, though in the ſame deed, *Grange de Lynge, eq nomine*, is expreſsly diſtinguiſhed from *Lynge in Ryſolm*, and is not mentioned in any part of the deed to be in the *pariſh of Ryſolm*. The jury were ſo deſirous of doing juſtice, that they withdrew with the deed at their own requeſt, though their inſpection of it was ſtrongly oppoſed by the reſpondent's counſel; and if no evidence had been given on the part of the appellant, there would be no ground to contend that a different verdict ought to have been found. *As to the ſecond iſſue*; it was clearly proved, that the yearly payments in lieu of tithes, had been invariably made for a great length of time, and nothing was in queſtion, but the concluſion from this fact: it cannot admit of a doubt, that every *modus* preſuppoſes *real compoſition*, though the original inſtrument is not extant; and the preſumption of the jury, that ſuch an inſtrument exiſted, though loſt or deſtroyed by length of time, is warranted by many great and reſpectable authorities. This preſumption was not deſtroyed by contrary proof, but only oppoſed by arguments, that the compoſition might be probably of a later date, than the diſabling ſtatutes; in ſupport of which arguments, a ſuppoſed rankneſs in the compoſition was much relied on, but the value of the eſtate in former times was not proved, but eſtimated by conjecture only: a diſtinction was taken between

between the plea of a *modus* and a *real compoſition*, but it has been held, that there is no neceſſity either in law or equity to uſe the word *modus*, it being a term *not neceſſary in pleading*.

3dly. The conſtruction which the learned judge, who tried the cauſe, put upon the ſecond iſſue, created much perplexity at the trial: the appellant, by his anſwer, had inſiſted that the tract of land called *Grange de Lyngs*, was *not* in the pariſh of *Ryſolm*, and this point was the object of the firſt iſſue; and he had alſo thereby inſiſted, that if *Grange de Lynge was* within the ſaid pariſh, it was exempt from tithes for the reaſons therein mentioned, and therefore he laid the compoſition real in lieu of tithes, *&c.* for all lands in the pariſh of *Ryſolm*, *except Grange de Lyngs*; this proviſional exception was neceſſary in the anſwer to the bill, but ſtanding in the ſecond iſſue as directed by the court, after the verdict on the firſt iſſue had ſevered *Grange de Lynge* from the ſaid pariſh, the learned judge adhered (as is humbly ſubmitted) to the *mere* letter, without attending to the true meaning of the iſſue, and conſidered the exception of *Grange de Lyngs*, in the ſecond iſſue, as inconſiſtent with the verdict on the firſt iſſue, and conſequently rendering it impoſſible (in his opinion) for the jury to find a verdict for the appellant in the ſtrict terms of the ſecond iſſue: but it is ſubmitted, that the exception in the ſecond iſſue, being proviſional or conditional only, *in caſe the jury had found* GRANGE DE LYNGS *had been in the pariſh*, the true meaning thereof was no more than this, that the jury at all events ſhould not conſider *Grange de Lyngs* (whether it were in the pariſh or not) as covered by the compoſition; the word *except* being in this, as in ſome other inſtances, ſynonimous with the words *not including*; and therefore the appellant ſubmits,

that this objection, founded on a grammatical nicety, contrary to the merits of the caſe, is not a ſufficient ground for a new trial of that iſſue; but if their lordſhips ſhould be of a contrary opinion, the appellant hopes that the ſecond iſſue ſhall (*in* that caſe) be varied in ſuch manner as to leave the queſtion indiſputably open for a ſecond trial on the merits, free from the objection taken by the learned judge to the form of the ſecond iſſue as it now ſtands; and as this objection goes only to the verdict on the ſecond iſſue, the appellant humbly hopes (in caſe it ſhould prevail) that the verdict on the firſt iſſue ſhall remain.

PARTICULAR ACCOUNT OF THE EVIDENCE ON THE TRIAL AT LAW.

Subſtance of the reſpondent's evidence on the firſt iſſue.

30th *September*, 30 *Hen.* VIII. An examined copy of a grant of this date from the king to *Charles* Duke *of Suffolk*, of divers eſtates in which the parcels *granted in fee* are deſcribed thus: "*All that ferme or graunge called* Lyngs Graunge, *otherwiſe called the* Graunge of Lyngs, *wth all and ſingler the membres and apptences in the countie of* Lincoln *to the late monaſtery of* Barlyngs *belonging or appteyning, and the rev'con & rev'cons thereof, togither wth all and ſingular meſſuages lands ten'ts rents rev'cons ſ'vices medows leſſues woods underwoods paſtures waters mylles comens ways fiſhings, rents reſerved upon every leaſe, and all other hereditaments comodities and profits, with all and ſingular their apptences to the ſaid ferme or* Graunge of Lyngs *belonging or anywiſe appertaining*; AND ALSO *all and ſingler* meſſuages lands *ten'ts rents rev'cons* &c. (totidem verbis) *and all other hereditaments comodities and profits, with all and ſingler their apptences in* Lyngs

within

within the parish of Rysolm *and in* Swinethorpe *within the parishe of* Snelland *in the said countie of* Lincoln, *to the said monastary of* Barlyng *and to the late house or monastery of* Kyrkstead *in the said county of* Lincoln *or either of them late belonging or appteyning, and all and singler rents reserved upon all and every lease and leases thereof.*" In another part of the same grant the king grants to the said *Charles* Duke of *Suffolk* and the heirs of his body, "All and singular those manors or lordships of *Barlyngs*, &c. and *(int' al')* *Risolm*, with all and singular rights, members, &c. in the said county of *Lincoln*, late belonging to the said monasteries of *Barlyngs* and *Kirkstead*, or either of them, and also all and singular those fermes or granges called *Holme Grange*, *Sheephouse Grange*, and RISOLM GRANGE, to the said late monastery of *Barlyngs* belonging."

Bargain and sale of this date, whereby *Adrian*, *William*, and *Anthony Stakes* bargain and sell to *George Saint Poll* all the manor of *Rysolm*, with the appurtenances; and all those messuages, granges, lands, &c. in the parish, town, and fields of *Rysom*. 4th *May*, 3 *Eliz.*

Several land and window tax duplicates were produced, and several witnesses examined, to prove that *Grange de Lyngs* had for many years past been assessed to those taxes under the denomination of *Risolme*.

This was the whole of the respondent's evidence on the first issue, except the evidence of some witnesses as to their opinion concerning the parish; but this being loose, and contradicted by witnesses on the other side, was waved by consent.

Substance

Subſtance of the appellant's evidence on the firſt iſſue.

21 *June*, 36 *Hen.* VIII. Licence to *Charles* Duke of *Suffolk* to alien to *George Saint Poll*, Eſq; *Lynge Grange*, otherwiſe *Grange of Lyngs*, with all its members and appurtenances, "*ac omnia alia heredimenta cum ſuis pertinencis ſituat' jacent' et exiſtent' in predicto grangio vocat'* Grange of Lyngs, A.C. *in* Ryſom *in com. predicto ſeu alibi infra com. predictum dicto* Grangio *vocat'* Grange de le Linges *alio pertinen. ſeu ſpectant.*" i. e. "And all other hereditaments with their appurtenances ſituate lying and being in the aforeſaid grange, called *Grange of Lyngs*, AND in *Ryſom* in the county aforeſaid or elſewhere within the aforeſaid county, to the ſaid grange, called *Graunge de le Linges*, otherwiſe appertaining or belonging."

24 *June*, 36 *Hen.* VIII. Grant from the Duke of *Suffolk* to the ſaid *George Saint Poll* of the *Grange of Lings*, with the appurtenances, in the county of *Lincoln*, and all meſſuages, &c. to the ſame belonging.

N. B. *No mention is made of* Rysom *in this grant.*

23 *April*, 7 *Jac.* I. Grant from the king to the Earl of *Hertford*, and his heirs, in which are theſe words; "*Omnia et ſingula maneria de* Scothorne, Dunſtan, Ryſom, &c. *ac totum ill' grang vocat'* Ryſom Grange," *i. e.* "All and ſingular the manors of *Scotherne*, *Dunſtan Ryſom*, &c. and all that grang called *Ryſom Grange*" which premiſes had then lately come to the crown by the attainder of *Henry* Duke of *Suffolk*.

Several ſubſequent conveyances were produced in evidence to ſhew that they were conveyed by diſtinct deſcriptions,

deſcriptions, and that wherever *Grange de Lyngs* is mentioned, it is deſcribed as lying generally in the county of *Lincoln*, without any reference to *Riſeme*.

The inſtruments to ſhew theſe were two deeds, one dated 13th *March*, 6 *Car.* I. another, 10 *February*, 7 *Car.* I. a common recovery ſuffered in *Michaelmas* Term, 23 *Car.* II. and an act of parliament in 12 Queen *Anne*, for veſting in truſtees the eſtate of Sir *John Brownlow*, Baronet, in which act *Grange de Lyngs* is more particularly diſtinguiſhed from *Riſom*, in the enumeration of towns, pariſhes, hamlets, or fields.

Certificate of the Biſhop of *Lincoln* to the governours of Queen *Ann's* bounty, in purſuance of the act of 5 *Ann.* Chap. 14. in which the rectory of *Riſeholme* is certified to be of the yearly value of fifteen pounds, with the following deſcription; preſentative, no *church, and but one family*.

It was proved by witneſſes, that there were two ancient manſion houſes, one of which was at *Grange de Lyngs*, and called the *Warren houſe*, and the other at *Ryſeholm*.

It was proved, that no perſon inhabiting *Grange de Lyngs*, had ſerved parochial offices at *Riſeholm*.

Thomas Clerke proved, that he formerly rented land of about ten pounds a year, at *Grange de Lyngs* for ſeveral years, and about eight or nine years ago was examined by two juſtices, as to his ſettlement, on his application to them for relief; that after their examination of him, they made no order upon *Ryſolm* for relief; that he afterwards went to *Mansfield Woodhouſe* in *Nottinghamſhire*, which was the place of his ſettlement before he lived at *Grange de Lyngs*, and was maintained

maintained there, and hath remained there ever ſince: this was the only inſtance of any inhabitant of *Grange de Lyngs* being reduced to become a pariſh charge, in the memory of any of the witneſſes.

Several duplicates of the aſſeſſments of the land-tax in different parts of the county of *Lincoln* were produced in evidence, whereby it appeared, that the practice in that county hath always been to aſſeſs extra-parochial places with the next adjoining pariſh, and to have the ſame aſſeſſors and collectors for both; and this practice was confirmed by the teſtimony of ſeveral witneſſes.

Subſtance of the Appellant's evidence on the ſecond iſſue.

The Biſhop of *Lincoln's* certificate already mentioned in the ſtate of the appellant's evidence on the firſt iſſue.

A great number of receipts at different periods of time, for the yearly payment of fifteen pounds to, or to the uſe of the reſpondent's predeceſſors from the year 1706, to the year 1767, including both years, and for the procurations and ſynodals from the year 1703 to the preſent time, which receipts were vouchers to ſeveral accompts of Lady *Brownlow's* ſteward, and ſuch of the books of the ſaid accompts as were ſigned by Lady *Brownlow* and her ſteward, were produced with the ſaid receipts.

A letter from Mr. *Adam Lugg* in 1721, directed to the maſter of *Baliol College*, produced by the reſpondent, on notice given by the appellant, expreſſing his doubt, whether he could get the rectory of *Ryſolm* advanced, as he takes notice, that the eſtate was then improved,

improved, and that he had with difficulty got *the* fifteen pounds.

A receipt of this date given by the appellants further to the Lord *Tyrconnel* in full for the outgoings which are therein mentioned to be payable thereafter out of the manor of *Ryſholme*; among the particulars therein mentioned, are the following articles; "To the rector of *Riſholm* fifteen pounds, and for procurations and ſynodals, ten ſhillings and three halfpence. *June* 3, 1721.

It was next proved, that the living was augmented by Queen *Ann's* bounty, in the year 1767, by lot, and the reſpondent's receipts were produced to prove, that he had received the intereſt ariſing from the augmentation, from 1767 to 1773.

The appellant's counſel then offered to call old witneſſes to prove ancient and invariable payments as far as the teſtimony of old witneſſes could go; but the judge interpoſed his opinion, that ſuch evidence was unneceſſary; the counſel then took notice, that the depoſitions of the witneſſes to this purpoſe had been read at the hearing of the cauſe; but the learned judge prevented the counſel from proceeding in this evidence by declaring, that they had proved ſufficient, to put the other ſide on proving their caſe.

Subſtance of the Reſpondent's evidence on the ſecond iſſue.

Letters patent under the great ſeal, being a licence of alienation and appropriation of the advowſon of *Riſeholme* to *Baliol College*, proved by producing an *inſpeximus* of the ſaid licence, which *inſpeximus* was under the great ſeal, bearing date 27 *Jan.* 29 *Eliz.* 16 *Edw.* III.

Evidence

Evidence was given by the bearer's book of the college, of the payment of a yearly corody, by the reſpondent and his predeceſſors to *Baliol College*, which was ſaid, but not proved, to have originated a little before the reſtoration.

21 Hen. VIII. A ſubſidy book found in the biſhop's regiſtry at *Lincoln* about that time, whereby it appears, that the rectory of *Ryſelm* was then returned to be of the yearly value of ſeven pounds, and that there was a penſion of one pound thirteen ſhillings and fourpence, payable out of it to the vice chancellor, and ten ſhillings and one penny halfpeny, for procurations and ſynodals.

Another ſubſidy book found in the ſame office, whereby it appears, that in 26 *Hen.* VIII. *Ryſelm* rectory was returned to be of the value of four pounds, with the like out-payments of one pound thirteen ſhillings and fourpence to the vicar, and ten ſhillings and three halfpennies, for procurations and ſynodals.

Some old ſubſidy, whereby it appeared, that *Riſeholme* rectory was rented at ſeven ſhillings and two pence halfpenny.

A book was produced out of the regiſter's office of the Biſhop of *Lincoln*, in which were copies of ſeveral terriers, two of which related to *Riſeholm*, containing an account of the glebe land ſaid to belong to that rectory, but varying materially from each other in the deſcription of the parcels, as well in quantities, as in ſituations and boundaries, in neither of which was any mention made of tithes, or any payment in lieu of tithes, one of which terriers was dated in 1580, and the other in 1601.

A pa-

A paper was produced by the Biſhop of *Lincoln's* ſecretary, found at *Bugden*, purporting to be a return to the biſhop to ſeveral articles of inquiry not produced, wherein is mentioned the value of ſeveral rectories; and amongſt the reſt, *Ryſholm* rectory is therein mentioned to be of the yearly value of ten pounds, and in which, or in other papers produced therewith, were invectives againſt prohibitions and *moduſes*, and advice to all clergymen to vary their compoſitions for tithes, or to that effect; the above paper appeared to be ſigned by one *Roger Parker*, as rector of a particular pariſh therein mentioned, to which it appeared by other written evidence, that he had been inſtituted in 1599, but no account was given how, or by what authority ſuch return was made, and therefore the paper was objected to by the appellant's counſel, as not admiſſable evidence, but ſuch objection was overruled by the judge.

A book of accompts found at *Belton*, the ſeat of Sir *Brownlow Cuſt*, from whoſe anceſters the appellant derives his title, containing ſteward's accompts, and, among the reſt, the rents of eſtates at *Riſholme* and *Grange de Lyngs*; the firſt of which is mentioned to be one hundred and four pounds a year, and the latter thirty pounds a year; but the book containing this account was not ſigned by Lady *Brownlow* or her ſteward.

The caſe of the * *Reſpondent.*

From the order of 16th *May* 1774, the appellant has appealed to your lordſhips, but the reſpondent

* See the caſe of the defendant, in this cauſe, in the court of *Exchequer*, under *Michaelmas* Term, 13 *Geo.* III.

humbly

humbly hopes, that the ſaid order will be affirmed; and a new trial of the ſaid iſſues granted for the following (among other)

REASONS:

1. For, that the verdict upon the firſt of the ſaid iſſues was given contrary to evidence; the grant of 30 *September* 30 *Hen.* VIII. was (it is ſubmitted) concluſive evidence to prove, that the lands called *Grange de Lyngs* were at that time in the pariſh of *Ryſom*, and no evidence was offered on the part of the appellant, to ſhew they had been ſeparated at any time ſubſequent

2. The verdict upon the ſecond of the ſaid iſſues was wholly unfounded upon any evidence, adduced by the appellant, the mere proof of payment, from the reign of Queen *Anne*, and the value of the living at that time, was no ſufficient evidence of a real compoſition made before the reign of Queen *Elizabeth*, or of an uniform payment, during that long period; and if there had been any weight in ſuch evidence, it was entirely deſtroyed by the reſpondent's evidence, which proved, that in 26 *Hen.* VIII. the reputed value of the living was only four pounds a year; that ſoon after the years 1599, the value of the living was returned by four neighbooring clergymen to the biſhop to be only ten pounds a year; that in 1601 the ſtate of the living appeared, from the terrier, to be very different from that contended for by the appellant; and not conſiſting of a bare annuity of fifteen pounds a year, clear of procurations and ſynodals, as alledged by the appellant in this iſſue.

3. For

3. For that, both the ſaid verdicts were (as the reſpondent conceives) contrary to the opinion of the learned judge, who tried the cauſe, as appeared by his report; and under thoſe circumſtances the inheritance of the church ought not to be bound by a ſingle verdict.

4. For that, the cauſe originated in the court of *Exchequer*, and the iſſues were directed for the information, and to ſatisfy the conſcience of that court; and the conſcience of the court ſtill remains unſatisfied by the preſent verdict (as is humbly preſumed) all the barons of the ſaid court having been unanimouſly of opinion, upon ſolemn argument and full conſideration, that a new trial ought to be granted.

March 8th, 1775.

Ordered and adjudged, that ſo much of the order complained of, as directs a new trial upon the firſt iſſue, be reverſed; and that ſo much of the ſaid order, as directs a new trial upon the ſecond iſſue, be affirmed; and that the court of *Exchequer* do give the proper directions for carrying this judgment into execution. The judgment of the Lords

Eaſter Term, 14 Geo. III.

April 28, A. D. 1774.

In the *Exchequer.*

Sir *Sidney Stafford Smythe*, Lord Chief Baron.
George Perrott.
Sir *James Eyre.*
Sir *John Burland.*

Edward Thurlow, Attorney General.
Alexander Wedderburn, Solicitor General.
John Glyn, Serjeant at Law, Recorder of *London.*

*** The above is extracted from "The *Nomenclature* of *Weſtminſter Hall*," annexed to "The Biographical Hiſtory of Sir *William Blackſtone*," *octavo* Edit. 1782.

Thomas Bateman, clerk, vicar of *Whaplode*, in the county of *Leiceſter*, } Plaintiff.

Samuel Aiſtrup, *Robert Collins*, *Robert Goulding*, *John Speechley*, *John Watſon*, *James Watſon*, *Joſeph Blackith*, *Hurſt Fowler*, the Governors of the free Grammar School of *Robert Johnſon*, Clerk, and the two Hoſpitals of Chriſt in *Okeham* and *Uppingham*, } Defendants.

The

The following proceedings in this cauſe, as alſo all the remarks, are extracted from the reverend plaintiff's pamphlets on the ſubject, one intitled "A Treatiſe on Agiſtment Tithe," the other "An Appendix thereto," both by Thomas Bateman, A. M. octavo, 1778, 1779.

THOMAS Bateman, clerk, vicar of *Whaplode*, in the county of *Lincoln*, did in *Michaelmas* Term, 21 *Geo.* III. A. D. 1770, exhibit his bill of complaint in this court againſt *Samuel Aiſtrup* and the other defendants, and the ſaid governors of the ſaid free grammar ſchools, thereby ſetting forth, that on *October* 1768, the plaintiff was duly inſtituted into the vicarage, and pariſh church of *Waplode*, in the county of *Lincoln*; and on the 12th *November* following was duly inducted into the ſame, and afterwards qualified himſelf for the enjoyment thereof; and had ever ſince been, and then was, vicar thereof, and as ſuch intitled to all tithes whatſoever, ariſing within the ſaid pariſh, and titheable places thereof, as were by any means payable to the vicar thereof.

The court unanimouſly decree, that the defendants ſhould account for the tithe of the agiſtment of all ſheep, which were kept, fed, and depaſtured on the lands occupied by them within the pariſh, during the time in the bill mentioned, from the time of their laſt ſhearing, until they were ſold off for, or taken out of the pariſh, before the next ſhearing thereof, and that they ſhould likewiſe account for what was due to the plaintiff for the tithe of agiſtment of all unprofitable cattle. *Batem.* App. 66.

That *by ancient* * *endowment, or other lawful means the vicars of the ſaid pariſh, for the time being, had, for a great number of years, been intitled to the tithe of hay, and* to all fruits, revenues, and oblations whatſoever, thereto belonging, except only the tithes of corn,

* *How far the plaintiff reſted his right upon the original endowment of the ſaid* vicarage *of* Whaplode, *to the tithes claimed by his bill, and of what authority it was allowed to be, by the court, in ſupport of ſuch claims will be explained hereafter, viz. next immediately following the extended copy of the original endowment at full length, with a literal tranſlation thereof. See* Batem. *App.* 19, 20.

wool, lamb, hemp, and flax, which were due and payable to defendants the governors, as impropriate rectors of the ſaid church, ſave that the vicars thereof, by virtue of ſuch endowment, were intitled *to the* * *redemption of all wool, and lambs, within the ſaid pariſh, from*

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* The redemptions, or, *what in the pariſh is called the* odds *of wool and lamb, and which are accountable to the vicar, are thus deſcribed in the endowment,* " *from the number five and under, to wit, whereſoever the tenth or tithe lamb or fleece of wool, according to the uſual mode of taking ſuch tithe, in the ſaid pariſh, is not due, the tithe of ſuch redemptions, or odds of wool and lamb, ſhall be paid to the vicar.*"

Thus a pariſhioner having only five or leſs lambs or fleeces of wool, is to account for them all to the vicar, if fifteen, one lamb or fleece to the new impropriators or their leſſees, and for the redemptions or odd five of each, to account to the vicar; the ſame with reſpect to 25, 65, 105, *or any other number more or leſs than where the exact tenth or tithe in kind is due.*

The intention of the endowment, as underſtood and explained by the pariſhioners time immemorial, being, that the perſons receiving the tithe of wool and lamb, ſhould be intitled to ſuch tithes, only ſo far as, according to the uſual made of tithing, a full tenth or tithe lamb or fleece was due, and that a valuable conſideration for the tithe of the odds or remainder, when and wherever there were any, expreſſed by the word redemptions, *ſhould be paid to the vicar.*

And theſe two tithes, viz. of hay and the redemptions of wool and lamb, are the only tithes, expreſsly, and by name, given by this endowment to the vicar, all the other tithes,

from number five, and under, but above ſuch number, the ſame were due and payable to the impropriate rectors, as aforeſaid.

The defendants, *Aiſtrup*, *Collins*, *Goulding*, *Speechley*, *James* and *John Watſon*, then occupied, and during all or the greateſt part of the time, ſince the 12th *November* 1768, had occupied, within ſaid pariſh, great quantities of land, on which they reſpectively had, in each year, great quantities of titheable matters, the tithes whereof were juſtly due and payable to plaintiff, as vicar of ſaid pariſh: particularly ſaid defendants had, from time to time, kept, fed, and fattened, on their ſaid lands, great numbers of ſheep, which they ſent to *London*, or elſewhere, for ſale; and that all, or moſt of ſuch ſheep, being by them kept ſome time after ſhearing thereof; plaintiff, as vicar, by virtue of ſaid endowment, became intitled to the tithe agiſtment of all ſuch ſheep, from the time of their laſt ſhearing, till they were ſold off fat, or taken out of the ſaid pariſh, for ſale, and before the next ſhearing thereof; which tithe was well worth one penny per month, for each ſheep, they being moſtly of a large ſize.

The ſaid defendants, in all, or moſt of ſaid years, ſince ſaid 12th *November* 1768, likewiſe kept, fed,

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tithes, to which he is intitled, being conveyed to him by the general words; Alteragium dictæ eccleſiæ, et totum emolumentum ab eodem alteragio, QUALITERCUNQUE proveniens, quocunque nomine cenſeatur et in quibuſcunque conſiſtat vel conſiſtere poterit, abſolute inconcuſſe; *viz.* decimis garbarum, lini, canopi, lanæ, et agnorum, duntaxat exceptis. *Batem.* 20, 21.

and depaſtured, on their lands, within ſaid pariſh, divers beaſts and other unprofitable cattle, the tithe of the agiſtment whereof, plaintiff ought to have been paid.

That defendants had, from time to time, neglected to pay plaintiff the ſeveral tithes aforeſaid, inſomuch that a large ſum of money was then due from each, to plaintiff, and plaintiff had frequently applied to them to account with him for the ſame, which he hoped they would have done; but the ſaid defendants combining with the other defendants, the governors and impropriators of the rectory of ſaid pariſh, and alſo with the defendants *Blackith* and *Fowler*, the leſſees of ſaid rectory, pretended no ſuch tithes were, as aforeſaid, due to plaintiff, as vicar of ſaid pariſh, but that the lands, occupied by them, were in ſome manner exempted or diſcharged therefrom, and at other times they pretended, that all ſaid tithes were due and payable to the defendants, the governors, as impropriators, or the defendants *Blackith* and *Hurſt*, as leſſees; whereas plaintiff charged the contrary thereof, and that none of the ſaid tithes, before claimed by plaintiff, had at any time been paid to defendants, the governors, or their leſſees, or if they had, that the perſons ſo paying the ſame had done it in their own wrong, and that plaintiff was well intitled to the ſame: at other times defendants pretended, they had paid plaintiff all ſaid tithes, which plaintiff charged they had not done, nevertheleſs they refuſed to make plaintiff any ſatisfaction, in reſpect thereof, or to account with him, for the ſame.

Therefore that defendants might anſwer the premiſes, and account with plaintiff for all ſaid tithes, and pay him what ſhould appear due thereon, plaintiff

tiff waving all penalties for defendants not ſetting out the ſame, and being contented to accept the ſingle value thereof, and for relief, was the end of the bill.

To which bill the ſaid defendants, being duly ſerved with the proceſs of this court, appeared, and put in their anſwers. Anſwers of the defendants.

And the defendants, *Goulding*, *Aiſtrup*, *Collins*, *Speechley*, and *John* and *James Watſon*, by their anſwer admitted. that the plaintiff, about the time in bill mentioned, was duly inſtituted and inducted into ſaid vicarage, and afterwards qualified himſelf for the ſame, and had ever ſince been, and then was, vicar thereof and as ſuch was intitled to ſeveral *ſpecies* of tithes, but whether by ancient endowment or otherwiſe, the vicar thereof became ſo intitled, they could not ſet forth, being ſtrangers thereto, and referred plaintiff to ſuch proof, as he could make thereof: had heard, and believed, that, during the time, whereof the memory of man was not to the contrary, there had been yearly, and accuſtomarily, ſuch tithes paid to the vicar of ſaid vicarage, as after-mentioned, to wit, tithe of hay in kind, or one ſhilling *per* acre or a compoſition, in lieu thereof.

Rape ſeed, cole ſeed, muſtard ſeed, and turnip ſeed; the tenth of ſuch ſeeds, upon the land, or ſhilling penny; to wit, a penny for every ſhilling, for which ſuch ſeed is ſold, upon requeſt, after being ſold, at the choice of the vicar, he making ſuch choice, at the time of threſhing ſaid ſeeds.

Said, that the tithe of corn, wool, lamb, hemp, and flax, were, as they believed, due and payable

to the defendants, the governors, as impropriate rectors of ſaid vicarage, or their leſſees, and the defendants *Blackith* and *Fowler* were the preſent leſſees thereof.

Had been informed, and believed, that the vicars of ſaid vicarage were intitled to one half-penny, and no more, for every fleece of wool, and every lamb, under five, called odds of wool and lamb, and not to tithe in kind thereof: all above that number belonging to the impropriate rector aforeſaid: believed, that within ſaid pariſh, there had been, time whereof the memory of man was not to the contrary, ſeveral *moduſes* and ancient cuſtomary payments, paid and accepted, by the vicar thereof for the time being, in lieu of the ſeveral *ſpecies* of tithes following, to wit.

For every cade lamb, one halfpennny, and no more.

For the milk of every milk cow, four-pence, and not the tenth in kind,

For every calf under ſeven, one halfpenny, and no more; and in caſe the pariſhioners and ground occupiers had ſeven calves in one year, then twenty-pence, in lieu of the tithe of ſaid ſeven calves, and not in kind.

For every calf, above ſeven, one halfpenny each.

For every foal, bred in the pariſh, under ſeven, one halfpenny, and no more; and in caſe any pariſhioners or ground occupiers had ſeven foals in one year, then five ſhillings, and not in kind; and

and for every foal, above ſeven, one halfpenny, each.

For every barren beaſt, above one year old, which had been kept in the pariſh above one month, and then ſold or removed; four-pence yearly, in lieu of the agiſtment tithe thereof, and not the tenth part of the profit.

Of young pigs, the tenth, when three weeks old.

Of geeſe, the tenth, when green, or at *Lammas*, at the choice of the vicar.

Of young turkies, the tenth.

For every horſe or beaſt of a ſtranger, agiſted in ſaid pariſh, if but one month, four-pence yearly, by the perſon ſo taking the ſame to agiſt.

For a garden, or an orchard, eight-pence yearly, and not tithes in kind.

For every communicant, above fourteen years old, two-pence.

For every dwelling houſe and fire hearth, yard, or privy tithe, otherwiſe called ſhot and wax, two-pence halfpenny.

Of reed in kind, or ſhilling penny, to wit, a penny for every ſhilling, for which it ſold, upon requeſt, at the choice of the vicar.

Of tithe underwood, two ſhillings in the pound.

For

For every ſtock of bees taken, four-pence, and not in kind.

For every ſtock of bees ſtanding all the winter, and not taken, two-pence, and not in kind.

And mortuaries as by the * ſtatute.

And that all ſuch payments were paid yearly, at *Eaſter* or afterwards, on demand thereof.

Said, that during the time in the bill, they had reſpectively occupied within ſaid pariſh, and titheable places thereof, divers quantities of land.

The defendant *Goulding* ſaid he occupied in 1768, 1769, and 1770, three hundred and forty-one acres.

The defendant *Aiſtrup* in 1768 occupied one hundred and forty-one acres, in 1769, one hundred and forty-nine acres, and in 1770, one hundred and ſixty-ſix acres, excluſive of ninety-one acres and one rood of meadow and paſture land, in eight pieces, called *Park Coats*, which were tithe free, and which he occupied in 1768, 1769, and 1770.

The defendant *Collins* in 1768, 1769, and 1770, occupied one hundred and forty-one acres.

The defendant *Speechley* in 1768, occupied one hundred and twenty-one acres, in 1769, one hundred and fourteen acres, and in 1770, one hundred and ſeven acres.

The defendant *John Watſon* in 1768, 1769, occupied one hundred and ninety acres, and in 1770, two hundred and fifteen acrees.

* 21 *Hen* VIII. chap. 6.

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The defendant *James Watſon* in 1768, 1769, and 1770, occupied one hundred and ſeventeen acres and two roods.

Said, they had, in a ſchedule to their anſwer, ſet forth an account of ſuch ſheep as were from time to time fattened on the lands, they ſo occupied in the ſaid pariſh, in each year, and the time when ſuch ſheep were ſo ſold or removed therefrom, ſince the plaintiff's induction, to the time of filing this bill.

Believed, that the impropriate rectors of ſaid pariſh or their leſſees had, from time whereof the memory of man was not to the contrary, been intitled to, and had received, from the pariſhioners and inhabitants of ſaid pariſh, and did then receive from defendants, and all other the inhabitants thereof, the yearly tithes following, to wit,

Corn, wool, lamb, hemp, and flax in kind; * *and an agiſtment tithe for all ſheep ſold out of the ſaid pariſh between*

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* *No tithe for the agiſtment of ſheep, or of barren and unprofitable cattle, had ever been either paid or demanded in the pariſh, previous to the filing of the plaintiff's bill. See* Batem. *Pref. to "Agiſtment Tithe." This aſſertion makes it requiſite to explain on what account the three-pence per head for all ſheep ſold or removed out of the pariſh betwixt* Candlemas *and ſheering time, here ſtated, had been heretofore paid.* Batem. App. 46.

Theſe defendants have ſet forth in the next ſentence of their anſwer, that there is paid to the leſſees of the impropropriators, a rate or compoſition tithe, of one fleece in the hundred,

between Candlemas *and ſheering day, which had been agiſted on any lands therein, except thoſe which were tithe*

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hundred, counting ſix ſcore to the hundred, for every month, for all ſheep which are brought into the ſaid pariſh after the 2*d day of* February, *and ſhorn therein, or betwixt* Candlemas *and ſheering day: and all ſheep ſold or removed out of the ſaid pariſh within that time and ſhorn in another, pay, in ſuch other pariſh, a like rate tithe for their wool; and therefore was there no demand upon ſuch ſheep in the pariſh from whence they are ſo removed; inſtead of paying a full tithe of their wool, they would only pay the above rate or compoſition tithe, of one fleece in the hundred* per *month. This three-pence* per *head therefore demanded for all ſheep ſold or removed out of the pariſh, betwixt* Candlemas *and ſhearing time, was, according to the old, but now obſolete law, in lieu of a rate tithe for wool, becoming due during the time ſuch ſheep were kept in the pariſh from whence they were ſo ſold or removed unſhorn. And in this pariſh this three-pence* per *head demanded for ſuch, was not heretofore for the tithe of their agiſtment, but for the rate tithe of wool as above explained; and was demanded for what were called ſpring ſheep, removed out of the pariſh before they were clipped. The word* agiſtment, *with reſpect to theſe ſheep, was never heard of till the preſent bill was filed; but as ſoon as it was filed, both the name and the nature of the right to the three-pence* per *head for theſe ſheep were intirely changed, and it was now ſaid to be due, and therefore ſubſtituted in lieu of the tithe of their agiſtment.*

It hath been ſaid above, according to the old, but now obſolete law of a rate tithe of wool, that ſuch law is now obſolete, it might perhaps be ſufficient here to obſerve, that

tithe free of three-pence per *head*; and alſo a compoſition tithe of one fleece in the hundred, reckoning fin-

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that it is now clearly held, and has frequently been determined in the court of Exchequer, that ſheep ſhall pay a full tithe of their wool in the pariſh where they are ſhorn, and tithe of their agiſtment in every other pariſh in which they have been kept ſince their laſt ſhearing, according to the value of their keeping and the time they have been ſo kept.

But leſt this ſhould ſeem to any of his readers too bold an aſſertion to be implicitly admitted merely upon his own authority; the author here begs leave to produce that of the preſent Lord Chief Baron of the court of Exchequer, *from his opinion, when Mr.* Skynner, *on this ſubject in the caſe of* —— —— —— —— *and which has been kindly communicated for the purpoſe by the favour of a friend.* Batem. App. 49.

Extract from Mr. (now Lord Chief Baron) Skynner's *opinion, &c.*

" *It was the rule in the canon law, eſtabliſhed by the conſtitution of Archbiſhop* Winchelſea, *and obſerved in the temporal courts,*

" *That if ſheep were agiſted in one pariſh, and afterwards ſhorn in another, a rate tithe ſhould be paid for the wool to the rector or vicar of each pariſh, in proportion to the time that the ſheep had been fed in each.*

" *This was found to be very inconvenient and detrimental to the church, for ſheep were often agiſted in one or more pariſhes and afterwards ſhorn in a diſtant pariſh, by which means the rectors or vicars of theſe pariſhes where*

ſcore to the hundred, every month for all ſheep which were brought into ſaid pariſh after the 2d of *February* and ſhorn therein, upon which day an account of ſuch ſheep is uſually taken by the impropriate rectors or their leſſees.

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where the ſheep had been agiſted, loſt their part of the tithe.

"*To remedy this inconvenience, the temporal courts introduced a new rule, which was, that the whole tithe of the wool ſhould be paid to the rector or vicar of the pariſh in which the ſheep were ſhorn, and that the rector or vicar of the pariſh in which they had been agiſted, ſhould have tithe for the agiſtment.*

"*This was greatly for the benefit of the church, as it not only ſecured the payment, but gave an additional tithe. But at the ſame time it changed the nature or ſpecies of the tithe, which was paid in thoſe pariſhes where the ſheep were agiſted. For whereas before the rector or vicar of thoſe pariſhes received a proportion of the tithe of wool, they from that time ceaſed to have any part of the tithe of wool, but received inſtead thereof the tithe of agiſtment.*

"*This is the rule of law as I conceive it now ſtands; and the reaſon of it being thus explained, it follows of courſe,*

"*That the whole tithe of wool, whatever practice may be to the contrary, is by law payable where the ſheep are ſhorn. And it follows too, that the whole of the tithe of wool being payable in the pariſh where the ſheep are ſhorn, ſuch are not* animalia fructuoſa *in the pariſh where they have been only agiſted, and therefore ought to pay an agiſtment tithe,* &c. &c." *See* Willis *on Agiſtment Tithe*, 65, &c.

Admitted,

Admitted, That during the time in the bill, they ſeverally fed and depaſtured ſheep which were ſhorn in the ſaid pariſh, and afterwards depaſtured on lands therein, and then ſold off fat, or otherwiſe diſpoſed of—an account whereof they had ſet forth in the ſaid ſchedule.

But denied that any agiſtment tithe was due to the plaintiff in reſpect thereof—For that * *all the ſheep that*

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* *Such was the plea alledged by the defendants, againſt paying any tithe for the agiſtment of ſheep, as ſtated in the bill, which plea was not allowed for the following reaſons:* 1ſt. *In order to have made the moſt of this plea, it was argued, that it ought to have been ſtated in their anſwer, and proved, that all the ſheep, which they, from time to time, ſo fed, ſold off, or removed out of the pariſh, were,* as ſoon as *ſo fed, ſold off,* &c. *replaced by* an equal number of others, *which were continued therein, in courſe, until the next ſhearing day, when they paid a full tithe of wool in kind; but this was neither ſtated in this anſwer, nor proved, nor attempted to be proved; for the graziers in that country begin to ſell off their ſheep from the time they are ſhorn, in the beginning of* July, *as they became fat, till after* Chriſtmas; *but they buy few or no freſh ones in again in their ſtead, at the ſooneſt, till the* May *following; and that for this obvious reaſon,* viz. *That their lands will not ſupport, much leſs fatten, more than half ſo many ſheep in the winter, as in the ſummer months.* Bateм. App, 52.

And ſuch few ſheep as are brought into the pariſh after Candlemas, *and there kept till their next ſhearing, and then ſhorn, inſtead of paying a full tithe of their wool in kind to the impropriators, pay no more than at the rate of one*

that were ſo from time to time fed, ſold or removed, were as often replaced by freſh ones, purchaſed by defendants, and depaſtured on their ſaid lands in their ſtead, and continued ſo thereon in courſe till the next ſhearing day, when they paid a full tithe in kind for the ſame to the impropriators or their leſſees.

Believed that whenever ſheep had been ſhorn in ſaid pariſh, and depaſtured on their lands after

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one fleece in the hundred,—counting ſix ſcore to the hundred, per *month, for the time they have been kept in the pariſh preceding their ſhearing—as they have themſelves ſtated in their anſwer.* See *Batem.* App. 35.

2dly, *But ſuppoſing the defendants granted more from this plea than they themſelves urged in their anſwer,* viz. *That all the ſheep which they from time to time ſo fed, ſold off, or removed out of the pariſh, were, ſo often as ſo fed,* &c. *not only replaced by freſh ones, but that as ſoon as they were ſo ſold,* &c. &c. *they were likewiſe replaced by* an equal number of others, *which continued therein till ſhorn,* &c.

Even this plea, with ſuch addition and amendment, it was argued, ought not, and it will be found did not, avail them for an exemption of ſuch ſheep from the payment of the tithe of their agiſtment from the time of their laſt ſhearing; for this reaſon, That, if admitted, it would be making ſome ſheep pay tithes for others; viz. *That certain ſheep paying tithe of wool in kind this year, ſhall exempt all thoſe ſold out of the pariſh the laſt from paying tithe of their agiſtment: In other words, that ſome ſheep paying one ſpecies of tithe in kind due this year, ſhall exempt other ſheep from paying a different ſpecies of tithe due the laſt year.* Batem. App. 52.

ſhearing,

ſhearing thereof, and afterwards ſold or removed therefrom before the then next *Candlemas* or counting day, that no agiſtment tithe was ever paid or demanded either by the impropriators or their leſſees, or by the vicar thereof; but that ſuch tithe wool in kind was always underſtood as a compenſation or ſatisfaction to ſuch occupier, he having paid a full year's tithe of wool, though ſuch ſheep had not been depaſtured more than half a year, which was frequently the caſe.

The defendant *Aiſtrup* ſaid, that he and his late father were tenants or leſſees of the impropriate tithes for forty years before the preſent leſſees *Blackith* and *Fowler*; and during all ſuch time it was underſtood by the pariſhioners, that, in conſideration of paying a full tithe of their wool for all ſheep brought in after clipping day, and before *Candlemas*, and afterwards clipped in the ſaid pariſh, they were not intitled to receive any agiſtment tithe for ſuch ſheep; nor did they ever receive or demand any, by reaſon ſuch ſheep which were ſhorn paid their whole year's tithe to the impropriators.

Admitted that they had kept on their lands, during the time in the bill, divers barren beaſts which were fattened thereon, and afterwards ſent to *London*, or other places, for ſale: and that † *for time immemorial there*

† *The payment of four-pence to the vicar for every beaſt ſold or removed out of the pariſh, was not controverted by the plaintiff; but, before the filing of his bill, it was never underſtood that ſuch four-pence was paid in lieu of the tithe of the agiſtment of ſuch beaſts. The defendants themſelves do not ſay it was paid for every bar-*

reſpectively offered to pay, and cauſed all ſuch tithes and other emoluments as were due from them to plaintiff ſince his inſtitution to ſaid vicarage, to be tendered to him, and which ſums, ſo tendered, they had ſet forth in the third ſchedule to their anſwer.

That at the time ſuch tenders were made, they believed that ſix-pence halfpenny was offered plaintiff for each of their dwelling-houſes, and fire hearths, commonly called ſhot and wax, for the year 1770; but had ſince been informed, and doubted not to prove, that * *plaintiff was intitled to no more*

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* *As much notice is here taken of this trifling article as if it had been of equal importance with the objects of the bill. But though ſuch* modus, *or ancient payment, is not at all mentioned in the bill, nor is any object of it, nor therefore intitled to any notice here, yet as the expreſſion occurs in ſeveral old terriers, in order to gratify the curioſity of thoſe who may be ignorant, but deſirous of being informed, of its origin, the following account may not be unacceptable.*

Hearth money. *The hearth-money or annual payment for each fire-hearth is, it may be preſumed, as general as that for communicants, and was payable in every pariſh in the kingdom, and was more or leſs, as to the particular ſum in each, according to its firſt inſtitution or ancient cuſtom. But what is here called ſhot and wax, which*

Shot and wax. *ſhould be expreſſed* ſhot for wax, *though confounded and ſtated to be one and the ſame due and payment with the hearth-penny, is a diſtinct and ſeparate offering or oblation; and due on another and a very different account,* viz. *the following: In the time of popery in this kingdom,* Candlemas-

more than two-pence halfpenny for each houſe and fire hearth, which ſum they then offered to pay plaintiff, and no more.

The defendant *Aiſtrup* ſaid, he occupied ninety-one acres and one rood of arable meadow and paſture land in eight pieces, called *Park Coates*, abutting on lands, ſome time ſince of the Earl of *Buckinghamſhire* on the eaſt, *Sparrow-hawkes lane* on the weſt and north, and on the *Hundle Free Bank* on the ſouth; which lands he believed had been, time immemorial, held and diſcharged of and from the payment of tithes, as being appendant to and formerly belonging to the abbey or monaſtery of *Croyland* in *Lincolnſhire*, at the diſſolution of which ſuch lands were by ſuch abbey held free and diſcharged from payment of tithes, (the ſame being one of the greater abbies) by virtue of the 31 *Hen.* VIII. ch. 13, and that no tithes whatever were payable for or in reſpect of ſuch lands, but were diſcharged therefrom.

That neither defendant, nor any other occupier thereof, as he knew or believed, ever paid any tithes for ſaid lands ſince the diſſolution of ſaid abbey, or within memory, to any impropriator, rector, or vicar whatſoever; and therefore had not ſet forth an account

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Candlemas-day *was one of the higheſt feſtivals in the whole year, on which each parochial church was grandly illuminated with wax candles; for the purchaſe of which each family contributed its quota or* ſhot; *and hence the money paid to the pariſh prieſt by each family, from whence this payment derived its origin, and which in ſeveral pariſhes yet ſubſiſts,* was called ſhot for wax. *Batem.* App. 57.

of his ſheep and other cattle fed or depaſtured thereon.

And the defendants the governors of the free grammar ſchools of *Robert Johnſon*, clerk, and the defendants *Blackith* and *Fowler* their leſſees, by their anſwer admitted that plaintiff was, at the time in bill, preſented, inſtituted, and inducted into ſaid vicarage, and as ſuch was intitled to receive ſeveral *ſpecies* of tithes under ſome endowment thereof; but not having ſeen the ſame, they referred plaintiff to ſuch proof as he could make thereof.

Believed that under ſuch endowment plaintiff was intitled to the tithe of cole ſeed and wool and lamb, when under five, and not otherwiſe.

Defendants the governors ſaid, they claimed to be, as they doubted not to prove, lay rectors and impropriators of ſaid pariſh, and as ſuch are intitled to all tithes, except ſuch as the vicarage was endowed with; they particularly claimed all the tithes of corn and grain, wool and lamb, ſave ſuch as before mentioned, hemp and flax, and an agiſtment tithe for all ſheep ſold out before ſhearing which had been agiſted on lands within the ſaid pariſh; which agiſtment tithe, as to ſuch ſheep ſold between the ſecond of *February*, the uſual day of taking an account thereof, and the time of ſhearing thereof, was, and from time whereof the memory of man was not to the contrary had been, as they believed, three-pence for each ſheep.

All the defendants ſaid, that the defendants the governors, being ſo intitled as aforeſaid, did by indenture dated the 12th day of *October*, 1769, demiſe

to

to defendants *Blackith* and *Fowler*, all that the rectory and vicarage impropriate of the parish church of *Whaplode* and the chancel of the same, and the glebe thereto belonging, and also all manner of tithes of corn, grain, and all other tithes whatsoever to said rectory and parsonage belonging or appertaining, except all timber trees and annual contribution of beans, commonly called pardon beans, usually paid and given to the poor by the farmers of said parsonage, to hold same to defendants *Blackith* and *Fowler* from the tenth of *October* then last for twenty-one years, at the yearly rent of 365*l.*

Know not nor ever heard that any agistment tithe was paid in said parish for unprofitable cattle to any person whatsoever, save as aforesaid; but that such agistment tithe is due of common right to defendants as lay rectors and impropriators, and which they claimed to be intitled to.

Know not whether any lands in said parish were exempt from payment of tithe; or, if any such were, how such exemption was made out.

Believed the other defendants had occupied lands in the said parish, and had titheable matters thereon, but what quantity thereof, or how long they had occupied the same, or the several *species* of titheable matters arising therefrom, they knew not, but referred themselves to the answer of the other defendants the occupiers for an account thereof.

And all these defendants denied combinations, and concluded their answers with the general traverse.

To which anſwers of the ſaid defendants the plaintiff replied; and the ſaid defendants rejoined; * *and the*

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* *Previous to the hearing of this cauſe, a joint commiſſion was iſſued out of the court of* Exchequer, *and directed to certain commiſſioners appointed reſpectively by the plaintiff and defendants, and held in the country for the examination of witneſſes, in proof of the allegations of each party in the bill and anſwer.*

Thoſe on behalf of the plaintiff proved all the requiſites as to his being vicar of the pariſh—as to each of the defendants occupying large quantities of land in the pariſh, upon which they fed divers quantities of ſheep, and likewiſe of barren and unprofitable cattle—as to the keeping of the ſheep from the time of their laſt ſhearing, till the time of their being ſold or removed out of the pariſh, being worth what it was ſtated at in the bill, &c. &c. *But it was not then thought either neceſſary or requiſite to examine any witneſſes on his part, as to the value of keeping of barren and unprofitable cattle.*

The depoſitions of the ſeveral witneſſes on the part of the defendants went to prove, that no other tithe had ever been paid by the occupiers of land in the pariſh to the vicar, nor otherwiſe than as ſtated in their anſwer, nor even demanded previous to the filing of the plaintiff's bill. That no tithe of any kind had ever been paid for the lands called Park Coats, *occupied by the defendant* Aiſtrup.

And they were adviſed that it was unneceſſary then to examine any witneſſes as to the value of the keeping either of ſheep, or of barren and unprofitable cattle, alledging, that it would be time enough to enter upon ſuch examination, after the plaintiff's right to ſuch tithe itſelf was eſtabliſhed

the cauſe being at iſſue, divers witneſſes were examined, as well on the part of the plaintiff, as on the part of the defendants, the occupiers of lands within the ſaid pariſh of Whaplode; *whoſe depoſitions being duly publiſhed, and this cauſe being put into the paper of cauſes,*

Came on to be heard in the *Exchequer* Chamber at *Weſtminſter*, on *Thurſday* 21 *April*, 1774, before the Right Honourable Sir *Sidney Stafford Smythe*, Knight, Lord Chief Baron; *George Perrot*, Eſq; Sir *James Eyre*, Knight; and Sir *John Burland*, Knight; the three other Barons of this court;

When upon opening the matter of the plaintiff's bill by Mr. *Ainge*, of counſel with the plaintiff, the anſwer of the ſaid defendants the governors and leſſees by Mr. *Kenyon*; and the anſwer of the defendants the occupiers of Mr. *Holiſt* their counſel; and upon hearing *Griffith Price**, Eſq; one of his Majeſty's counſel, learned in the law, and the ſaid Mr. *Ainge* of counſel with the plaintiff; and reading the anſwers of the ſaid defendants the occupiers and the depoſitions of *Henry Hull*; *an endowment* * *marked letter* A. *from*

* See "*Nomenclature*" to Mr. *J. Blackſtone*'s Biographical Hiſtory.

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eſtabliſhed by the decree. After it was eſtabliſhed, the defendants were permitted to examine witneſſes, as to the value of the keeping of the ſheep, and of ſuch ſpecies *of barren and unprofitable cattle, under as many different commiſſions from the court of* Exchequer, *as mentioned in* Batem. Agiſt. 96, &c. *Such was the ſum of the depoſitions of the witneſſes here mentioned on each ſide, in conſequence of which iſſue was joined, and the cauſe was brought to an hearing.* Batem. App. 90.

* *A copy of this inſtrument, as hath before been mentioned, is annexed, the authority it was allowed of by the court,*

from the regiſtry of the Biſhop of Lincoln; the induction of the plaintiff to ſaid vicarage of *Whaplode:* and the ſeveral depoſitions of *John Torner*, *Richard Ediſon*, *William Park*, and five more witneſſes, on behalf of the ſaid plaintiff; and upon hearing *John* * *Skynner*, Eſq; one of his Majeſty's counſel learned in the law, on behalf of the ſaid defendants; and reading the following evidence on their behalf, to wit, the depoſitions of *Joſeph Greathead*, *Robert Buſk*, *Henry Tatam*, *John Taulks*, and *Shadworth Smith*;

* See the ſaid "*Nomenclature*," p. 33, 38.

The further hearing of this cauſe was adjourned to *Monday* the 25th day of *April* inſtant, when upon reading further evidence for the ſaid defendants, by conſent, copies of three terriers from the regiſtry of the Biſhop of *Lincoln*, the firſt in 1690, the ſecond in 1706, and the third 28th *June*, 1709; and upon hearing Mr. *Madox* and the ſaid Mr. *Heliſt*, of counſel on behalf of the ſaid defendants the occupiers; and the ſaid Mr. *Kenyon* on behalf of the defendants the governors and leſſees of the free grammar ſchools of *Robert Johnſon*, clerk, and the two hoſpitals of Chriſt in *Okeham* and *Uppingham*, and upon hearing

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court, and the particular paſſages of it upon which the plaintiff's right to the tithes claimed in his bill was reſted, have already been ſtated, perhaps ſatisfactorily, [*ſee* ante, p. 659.] *if not, whatever more was ſaid by his moſt able counſel,* [*ſee* Batem. *App.* 111, 114.] *or which the author humbly preſumes could have by any other have been ſaid concerning it, ſo far as it related to the preſent objects of litigation, is ſo fully and clearly expreſſed in the extract of the latter ſubjoined to it,* [*which ſee* poſt. p. 701.] *that he here begs leave to inſert it, inſtead of any obſervations of his own.* Batem. App. 92.

the

the ſaid *Griffith Price* in reply; this cauſe was further adjourned over to this day for the opinion of the court: and this cauſe ſtanding in the paper of cauſes accordingly,

It is thereupon this day ordered and decreed by the court, that the plaintiff's bill, as againſt the defendants the impropriators of the vicarage and pariſh church of *Whaplode* be, and the ſame is hereby diſmiſſed out of this court without coſts.

And it is further ordered, adjudged, and decreed by the court, that an account be taken of what is due to the plaintiff for the tithe of agiſtment * *of all ſheep which were kept,*

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* *The only objection the author has ever heard urged againſt this treatiſe on agiſtment tithe, was, that the decree in this caſe did not go ſo far as the principles and poſitions laid down in it, particularly that, notwithſtanding this decree, no tithe ever was, or is yet due for the agiſtment either of ſheep, from the time of their laſt ſhearing, till the time they were ſold or removed out of the pariſh, and before the next ſhearing; or for barren or unprofitable cattle,* whilſt kept upon lands which had in the ſame year been mown.

It is to be hoped the decree itſelf will ſatisfy, and, for the future, ſilence all ſuch objections.

The defendants the occupiers, in their anſwer, have each pleaded, that they had in each year occupied divers quantities of arable, meadow, *and paſture land in the pariſh. That* arable *ſignifies* ploughed *land, it is preſumed there cannot be the leaſt doubt; and that by* meadow *is meant* mown *land, it is likewiſe preſumed there can be as little.*

May

kept, fed and depaſtured on the lands occupied by the ſaid defendants Samuel Aiſtrup, Robert Collins, Robert Goulding, John Speechley, John Watſon, *and*

May it not therefore be freely and fully ſubmitted to the judgment, even to the determination of every perſon capable of underſtanding plain Engliſh, *whether or no the words of the decree do not equally extend to the agiſtment of ſuch ſheep as have been kept even upon the* ſtubbles *of lands which have in the ſame year before paid tithe of corn in kind; and likewiſe to ſuch as have been kept upon the* eddiſh *or* after graſs *of lands which have in the ſame year been mown and paid tithe of hay in kind; as to ſuch as have been kept only upon paſture lands, which have neither been ploughed nor mown in the ſame year, and conſequently paid no other tithe at all?*

The words are, all ſheep *fed on the lands,* &c. without any exception at all.

In the above ſenſe the decree was underſtood both by the plaintiff and the defendants, and both their ſolicitors; it was underſtood in the ſame ſenſe by the deputy remembrancer of the court of Exchequer, *who iſſued no leſs than three commiſſions out of that court, under its authority, in order to take an account of the value of the keeping of all ſheep from the time of their being laſt ſhorn, till the time they were ſold or removed out of the pariſh on whatever lands kept during that time. And in conſequence of ſuch value being ſettled in purſuance of ſuch commiſſions, the defendants, and all the reſt of the pariſhioners, did account for all the ſheep ſo kept, and afterwards ſold or removed out of the pariſh, whether upon arable, meadow, or paſture land, without any exception.* Batem. App. 93.

James

James Watſon, *during the time in the bill mentioned; and by them fatted and ſold off, or otherwiſe diſpoſed of* from the time of their laſt ſhearing, until they were*

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* *This decree obviouſly extends to all ſheep ſold or removed out of the pariſh* at any time of the year *after their laſt ſhearing, and before the next,* i. e. *betwixt each ſhearing time.*

Both the defendants the occupiers, and the defendants the impropriators, in their anſwers, have ſet forth, that there had always been paid to the impropriators, or their leſſees, an agiſtment tithe of three pence each, *for all ſheep ſold or removed out of the pariſh in each year* betwixt *Candlemas* and the next ſhearing time. *After this decree, therefore, it became a matter of diſpute betwixt the plaintiff and the impropriators, whether or no it ſo far interfered with any of their former rights, as to order an account to the plaintiff for ſuch ſheep as had been ſold or removed out of the pariſh in each year,* betwixt *Candlemas* and the next ſhearing time, *for which their leſſees had ever before received an agiſtment tithe of threepence each ſheep, as ſtated above. The plaintiff inſiſted, that it did; the impropriators, on the contrary, inſiſted, that it did not; and argued, that as the bill as againſt the impropriators was diſmiſſed, though it was not ſo diſmiſſed as againſt their leſſees, the decree left all their rights as it found them; nor was the plaintiff able to convince either themſelves or their ſolicitor, that all the ſheep ſold or removed out of the pariſh after the laſt ſhearing,* and before the next, *perhaps the 1ſt of* July, *meant any thing more than, the ſheep ſold out of the pariſh after the laſt ſhearing,* and before the next *Candlemas-day,* viz. February, *i. e. from the 1ſt* July, 1774, *till*

were ſold off fat, and taken out of the ſaid pariſh for ſale, and before the next ſhearing thereof.

And

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till the 1ſt July, 1775, *was the ſame as from the 1ſt* July, 1774, *till the 1ſt* February, 1775.

At a meeting of ſeveral of the acting governors, the impropriators, and their ſolicitor, and the plaintiff, at which, after this grand point in diſpute had been long argued, neither of the parties would give up their opinion, each thinking they had the words of the decree in their favour. It was therefore at laſt agreed to refer the matter to the opinion and deciſion of counſel; and the plaintiff even propoſed to leave it to the opinion and deciſion of the impropriators' own counſel concerned in the cauſe; and this agreement was entered in the minutes of the impropriators books at their audit. Their counſel, after having the caſe three times ſtated to him by the different parties, gave the matter in diſpute fully and clearly in favour of the plaintiff. The impropriators however, upon the matter being thus given againſt them, revolted from their agreement, though entered in their books; and, by their ſolicitor, wrote to the plaintiff, that they would not abide by the opinion of their counſel, but would have the matter reheard, and propoſed, that the plaintiff ſhould be at half the expence. This propoſal the plaintiff did not think proper to comply with; but remonſtrated againſt their infraction of their agreement, and revolting from the minutes entered in their books, in ſuch a manner, that one of the acting governers, the impropriators ſoon after informed him by letter, that if any reflections were caſt either upon them, or their proceedings, as ſeveral of them were peers of the realm, they would ſo far exert their

privileges,

And that an account be likewiſe taken of the * *tithe of the agiſtment of all barren and unprofitable cattle kept, fed and*

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privileges, that the plaintiff ſhould be brought before the bar of the Houſe of Lords.

Notwithſtanding this menace, as there was the utmoſt reaſon to believe, none of the noble peers alluded to were at all privy to it, nor even to the proceedings which occaſioned it, the plaintiff himſelf brought the matter to a rehearing before the maſter in Chancery, *or deputy remembrancer in the court of* Exchequer, *by whom it was determined in his favour.*

Obvious as this matter may appear, it was, from various circumſtances, and after occaſioning much expence, upwards of two years in being determined: and this detail of it is here given, in order to prevent any of his brethren being ſurpriſed at not being able to convince their pariſhioners reſpecting their right, either to the ſame or any other new ſpecies of tithes before *their having obtained a decree, when the author himſelf met with ſo much difficulty in doing it after.* Batem. App. 95.

* *What has already been ſaid relative to thoſe barren beaſts for which* any thing, *and likewiſe thoſe for which* nothing *had ever before been paid to the vicar, may perhaps ſufficiently explain this part of the decree: leſt however it ſhould not, it may not appear impertinent here to ſtate the matter a little differently thus.*

The year with reſpect to barren and unprofitable cattle ended at Eaſter. *So many beaſts therefore as any pariſhioner or land occupier ſold out of the pariſh betwixt one* Eaſter

and depaſtured, on the lands occupied by the ſaid defendants in the ſaid pariſh.

Except only ſuch as were above one year old, and which had been agiſted within the ſaid pariſh above one month, which are to be accounted for at the rate of four-pence per *head, in lieu and ſatisfaction of ſuch agiſtment tithe, according to the* modus *or cuſtomary payment in the ſaid defendants the occupiers anſwer mentioned.*

And it is hereby referred to *Francis Ingram*, Eſq; the deputy to his Majeſty's remembrancer of this court to take the ſaid account.

In taking whereof he is to make to each party all juſt allowances; and for the better taking of the ſaid account,

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Eaſter *and another, ſo many four-pences were due to the vicar. And this* modus *or cuſtomary payment extends to beaſts only; whilſt for ſuch barren beaſts, and likewiſe horſes, as had been kept all the year round in the pariſh,* i. e. *from one* Eaſter *to another,* nothing had ever been paid. *The difference therefore which this decree made, with reſpect to them, was this, that for every beaſt ſold betwixt one* Eaſter *and another, four-pence was ſtill to be paid to the vicar as uſual: and that all thoſe kept the whole year round, whether barren and unprofitable beaſts or horſes, ſhould pay the tithe of their agiſtment according to the value of the keeping of each* per *week,* &c.

And thus after ſeveral commiſſions upon the matter, the account here ordered was at laſt ſettled by the two commiſſioners, the one appointed on the part of the plaintiff, the other on that of the defendants, and other land occupiers in the pariſh, of which the following is ſtated as an example:

Barren

account, all parties are to produce, before the ſaid deputy remembrancer, all books, papers and writings, in their cuſtody or power relating thereto; and are

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Barren and unprofitable cattle, ſold or removed out of the pariſh of W———, *betwixt* Eaſter 1775, *and ditto* 1776, *by* ——— ———

	£.	s.	d.
Fourteen beaſts at four-pence each -	0	4	8

Barren and unprofitable cattle kept in the pariſh from Eaſter 1775, *till ditto* 1776.

Agiſt. Tithe.

	£.	s.	d.
Twelve beaſts from one to two years old, at one ſhillings each, - -	0	12	0
Ten ditto, from two to three, at one ſhilling and ſix-pence, - -	0	15	0
Twelve ditto, from three to four, at two ſhillings, - - -	1	4	0
Twelve ditto, from four to five, at two ſhillings and ſix-pence, - -	1	10	0
Colts and fillies.			
Four from one to two years old, at two ſhillings and ſix-pence, - -	0	10	0
Six from two to three ditto, at five ſhillings,	1	10	0
	£. 6	5	8

are to be examined upon interrogatories touching the ame, as the ſaid deputy remembrancer ſhall direct: and the ſaid deputy remembrancer is to be armed with a commiſſion, and one or more commiſſion or commiſſions may iſſue into the country, for the examination of the ſaid parties, or witneſſes touching the ſaid account, if neceſſary.

And if any ſpecial matter ſhall ariſe in taking the ſaid account, the ſaid deputy remembrancer is at liberty to ſtate it to the court: and the ſaid deputy remembrancer is to make his report therein with all convenient ſpeed.

As what has before been ſaid relative to ſheep, is equally applicable to barren and unprofitable cattle, it is unneceſſary to add more here reſpecting them, than that as there is no exception whatever in the decree as to what lands ſuch barren and unprofitable cattle had been kept upon, whether upon meadow or paſture land, that is upon lands which had in the ſame year been mown and paid tithe of hay in kind, as upon thoſe which had not, the barren and unprofitable cattle upon the former were ordered by the ſeveral commiſſions iſſued in conſequence and execution of the decree, to account for the tithe of their agiſtment equally with thoſe kept only upon the latter, and under the ſanction of ſuch decree and commiſſions, they did all account accordingly, though it was well known and acknowledged, that many of ſuch barren beaſts were kept all the time *from their being brought into the pariſh, till they were ſold out of it, upon nothing but the eddiſh or aftergraſs of lands which had before been mown and paid tithes of hay in kind, the ſame year.* Batem. App. 99.

And

And the cauſe is to be continued in the paper of cauſes, to be further heard upon the coming in of the report.

* *And it is further ordered and decreed, that no coſts be paid by either party to this time,* but that the ſubſequent coſts, and all further directions, herein be, and are hereby reſerved, till after the coming in of the ſaid report.

By

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iii.* *It may perhaps ſeem ſomewhat ſingular, that the plaintiff ſhould have an unanimous decree given in his favour, for every thing prayed for in his bill, and yet not be allowed coſts; but ſo it is, and he knows no other, nor can aſſign any better reaſon for it, than, that all the claims ſet forth in his bill were entirely new, none of them having ever been either paid or demanded in the pariſh before.*

A copy of the plaintiff's bill of coſts the reader will find at the end of the remarks on the endowment, poſt, *p.* 708; *and it is preſumed it would be unneceſſary to offer any apology here for publiſhing it, as it will enable all who may hereafter be diſpoſed to litigate their right to this tithe, to weigh, in a juſter ſcale, the expence of ſuch a litigation, againſt the acquiſition in conſequence of it.*

The following bill is confined ſolely to thoſe in the court of Exchequer, *by which the plaintiff was ordered to pay his own coſts till the time of the decree. But ſeveral commiſſions were gone through at the inſtance of the defendants a long time after the decree, as has before been explained in the treatiſe, and much expence was incurred by them in the execution of ſuch commiſſions, both in the court of* Exchequer *and conſiſtory court at* Lincoln; *it was*

Tithe of agistment of sheep and barren and unprofitable cattle is due, though they are kept upon land which has before paid tithe of hay or corn in kind in the same year, or upon summer eaten ground, which has paid tithes in kind for lambs, fleeces, and other things.

By the decree in this cause it appears, not to be material, upon what lands sheep and barren and unprofitable cattle are kept, whether upon land which has before paid tithe of hay or corn in kind in the same year, or upon summer eaten ground, which has paid tithes in kind for lambs, fleeces, and other things; all the defendants in this cause are ordered to account to the plaintiff, for the tithe of their agistment. 3 *Burn*'s Eccles. Law, 435.

Some land may pay three or four different tithes in the same year, which is contrary to the doctrine in the old books. 3 *Burn*'s Eccles. Law, 436.

Suppose an occupier of lands mows any of his lands in *July*, and pays the tithe of hay in kind; at the proper time he turns feeding beasts upon the eddith, or after grass, which must pay the tithe of their agistment, during the time they are kept upon it, according to the value or usual price of the depasturage of such beasts *per* week, upon such eddith or after grass, in that parish or neighbourhood; after the eddith is consumed and eaten up by these beasts, other barren and unprofitable cattle are put and kept upon the same land during the winter, others again for the spring eatage, which must pay the tithe of their agistment, during the time they have been so kept upon that ground, according to the value of the keeping of every such beast or horse *per* week, upon

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however at last agreed betwixt all parties, that all matters yet remaining in dispute betwixt them should be settled and determined amicably between themselves. In consequence of which, by an agreement entered into for that purpose, the plaintiff was to pay all his own costs in the court of Exchequer, *but to have all those in the consistory court at* Lincoln *allowed him by the defendants.* Batem. App. 102. *See* Batem. Agist. 101.

such

ſuch lands at that time, and in that ſtate; ſo that in this caſe it is determined, that the ſame land may pay three or four different tithes in the ſame year; which is contrary to the doctrine generally delivered in the old books, that the ſame lands ſhall not pay tithes twice in the ſame year.

The decree is founded upon this general principle, that the owner of the tithe is intitled to the tenth part of the land, or the value thereof; and conſequently as often as there is a new increaſe, ſo often a new tithe becomes due.

As owner of tithes is intitled to tenth part of land, or the value thereof, conſequently, as often as there is a new increaſe, ſo often a new tithe becomes due. 3 *Burn's* Eccleſ. Law, 435.

* Copy of the original Endowment.

" Archediaconat^r, Lincoln' Ordinatio Vicariæ de *Quappelad.*

" UNIVERSIS Chriſti fidelibus preſentem paginam inſpecturis, *Ricardus* miſeratione divina *Lincoln* epiſcopus, Salutem in Domino ſempiternam, ad univerſitatis veſtræ notitiam per preſentem ſcripturam volumus pervenire: Quod cum dilecti in Chriſto filii religioſi viri abbas et conventus *Croyland*, gratum conſenſum et aſſenſum claræ et recolendæ memoriæ beati *Hugonis* quondam predeceſſoris noſtri, ac etiam ſanctiſſimi *Honorii* eccleſiæ *Romanæ* quondam ſummi pontificis, ſuper *hoc* confirmationem de eccleſiâ de *Quappelad*, cujus fuerant et ſunt patroni, in proprios uſus habenda, dudum optinuiſſent, ſicut in eorum inſtrumentis plenius continetur, noſque *Batem.* App. 105.

* This copy was taken by *J. B.* the deputy regiſter, from the ancient roll of inſtitutions and charters of *Richard Gravesend*, formerly lord biſhop of *Lincoln*, who began to preſide over that ſee, in the year of our Lord 1258. *Batem.* App. 110.

precibus devotiſſimis et ſæpius iteratis, ut hujus conceſſioni et gratiæ, per dictum predeceſſorem noſtrum gravitate religionis ſuadente, favorabiliter eis factæ noſtrum conſenſum et aſſenſum favorabilem in premiſſes benignius impartiri curaremus, pulſaverint, ſollicitaverint, ac ſollicitudine quam potuerunt interpellaveriht; nos demum devotionem dictorum religioſorum ſpecialem & ſinceram in Domino dilectionem, quas erga venerabilem eccleſiam noſtram *Lincoln'* ipſiuſque pontifices ſemper habuiſſe dicuntur, attendentes, eorum dignis poſtulationibus et precibus animum noſtrum duximus facilius inclinare et celerius poſtulata concedere."

"Cum igitur in monaſterio *Croyland* religionis gravitas, ordinis obſervantia, perſeverantia ſanctitatis, ac precipue hoſpitalitatis gratia, quæ in eo augere noſcuntur, ipſum monaſterium reddant et reddere debeant omnibus gracioſum; nos, ad memoriam revocantes quod gratis gratiam poſtulantibus non ſit aditus gratiæ precludendus, de dilectorum in Chriſto filiorum *Willmi.* de *Leſſington* decani et capituli noſtri *Lincoln'* aſſenſu, et grato conſenſu concurrente divinæ pietatis intuitu, et ſpecialiter ad divini cultus officium inibi ampliandum, dedimus, conceſſimus, et preſenti cartâ noſtrâ confirmavimus *monaſterio Croyland*, et' monachis ibidem Deo jugiter famulantibus, eccleſiam de *Quappelad* in quâ jus optinent patronatûs, in proprios uſus ſuos in perpetuum poſſidendam, cujus quidem eccleſiæ proventus et redditus in hujuſmodi uſus convertant, et abſque cujuſlibet impedimento licite convertere valeant in futurum, vicario tamen in eâdem eccleſiâ perpetuo ſervituro, in quâ vigere ordinamus et conſtituimus, vicariam de ipſius eccleſiæ proventibus pro ſuâ ſuſtentatione ſuorumque miniſtrorum, et pro oneribus

ſup-

ſupportandis porcione congruâ reſervatâ, porciones autem dictorum abbatis et conventus ac vicarii prelibati, per eoſdem nobis et ſucceſſoribus noſtris, cum ipſam vicariam vacare contigerit, preſentandi, ita duximus, auctoritate pontificali diſtinguendas, vidilicet, Quod

" Abbas et conventus ſupradicti habeant totam decimam garbarum ipſius eccleſiæ de *Quappelad*, cum totâ dominicâ terrâ, juribus et appendiciis ſuis, ad ipſam eccleſiam qualitercunque ſpectantibus, totamque decimam lini et canopi purè et abſolutè, inſuper habeant et quiete percipiant totam decimam lanæ et agnorum de totâ parochiâ provenientem; in velleribus lanæ ſcilicet et agnorum corporibus conſiſtentem."

" Vicarius autem nobis et ſucceſſoribus noſtris, per predictos abbatem et conventum, ad dictam vicariam ſucceſſivè pro tempore preſentandus per hanc ordinationem noſtram ratione vicariæ percipiet et habebit in perpetuum totum * alteragium dictæ eccleſiæ de *Quappelad*, et totum emolumentum ab eodem alteragio, qualitercunque proveniens, quocunque nomine cenſeatur, & in quibuſcunque conſiſtat vel conſiſtere poterit, abſolutè et inconcuſſe, de-

* The word *alteragium*, as defined by the eccleſiaſtical law writers, ſignifies all tithes, offerings, oblations, *&c. &c &c.* becoming due to a miniſter by virtue of his office; or for officiating at the altar; and conſequently has ſuch a latitude of meaning as to comprehend every titheable matter not expreſsly mentioned in the endowment among the tithes appropriated. The word *alteragium* alone, under the circumſtances above mentioned will convey the tithe of *agiſtment* to the vicar; it was thus allowed in the author's own caſe, who reſted his right to this tithe, ſolely upon the above general words of the ſaid endowment of his vicarage. See *Butem.* Agiſt. 80.

cimis, † garbarum, lini, ‡ canopi, lanæ et agnorum, et etiam totâ dominicâ terrâ, cum juribus ſuis et appendiciis, ut predictum eſt, *duntaxat exceptis*. Habebit etiam idem vicarius et percipiet totam decimam feni totius parochiæ integrè, et ſine omni diminutione, et abſque impedimento abbatis et conventus predictorum."

"Habebit inſuper redemptiones lanæ et agnorum ubicunque in parochiâ a numero quinario et ſic inferius deſcendendo computando, ubi ſcilicet ſecundum conſuetudinem loci, ad decimam velleris et agni non poterit aliquatenus pervenire, omnimoda decima tam lanæ quam agnorum, ultrà quinarium numerum aſcendendo, proveniente, juxta conſuetudinem ſupradictam, penes prefatos abbatem et conventum, ut pretactum eſt, totaliter remanente, ſuper quo dolum et fraudem ab aliquo fieri, ſub pena majoris ſententiæ, firmiter inhibemus."

"Cæterum ordinamus, quod abbas & conventus prenominati inveniant vicariis, pro loco et tempore ſucceſſive inſtituendis, manſum compitentem in loco congruo, per eoſdem abbatem et conventum, in principio primi vicarii, poſt ceſſionem vel deceſſum *Simonis* nunc ipſius eccleſiæ *Quappelad* vicarii, in proximo inſtituendi conſtructum et compitenter edificatum; deinceps ſi caſus fortuitus, neceſſitas, vel vetuſtas hoc exigat, per vicarium qui pro tempore fuerit reficiendum, vel de novo faciendum, cum

† The word *garba*, as explained by the eccleſiaſtical writers, ſignifies *faſciculus, manipulus ſpicarum*; and comprehends all kinds of grain; even beans and peas, from their being tied up in ſheaves or bundles. *Batem.* Agiſt. 81. n.

‡ *Canopi*, ſo the word is ſpelt in the original endowment, and in ſeveral others; though *cannabis*, or *cannabi*, are more frequently uſed, all ſignifying hemp. *Batem.* Agiſt, 81. n.

oportuerit

oportuerit in loco prius aſſignato. Ordinamus inſuper, quod primus vicarius, poſt ceſſionem vel deceſſum dicti *Simonis*, ſuo perpetuo per epiſcopum inſtituendus, et omnes ſucceſſores ſui qui pro tempore fuerint, onera ordinaria epiſcopalia et archidiaconalia debita et conſueta ſuſtineant et agnoſcant, quodque libros, veſtimenta, et cetera ornamenta eccleſiaſtica neceſſaria, et cancellum eccleſiæ, cum reparationem indiguerit, ſumptibus ſuis reparent et inveniant; ac etiam omnes miniſtros ad deſerviendum vicariæ prelibatæ neceſſarios exhibeant et ſuſtineant: hanc autem ordinationem noſtram in omnibus et ſingulis articulis ſupradictis volumus et ordinamus vires habere perpetuas, ſalvis in omnibus epiſcopalibus conſuetudinibus et *Lincoln'* eccleſiæ dignitate. Ut autem ordinationi noſtræ preſenti plena fides adhibeatur, et dictis abbati et conventu vicariiſque futuris perpetua ſecuritas præparetur, preſentem paginam noſtro ſigillo fecimus communiri. Actum menſe *Januarii* anno gratiæ mileſſimo ducentiſſimo ſexageſſimo octavo, et pontificatûs noſtri anno undecimo."

A Tranſlation of the Original.

The Archdeacon of Lincoln's *Ordination of the Vicarage of* Whaplode.

"To all the faithful in Chriſt, who ſhall peruſe theſe pages, *Richard* by divine compaſſion biſhop of *Lincoln*, ſends greeting: We wiſh your whole body to underſtand by this preſent writing, that whereas the ſons, the religious men, the abbot and convent of *Croyland*, beloved in Chriſt, have long ſince, for *this* purpoſe, obtained the kind conſent and aſſent of the bleſſed *Hugo*, our former predeceſſor, and alſo of the moſt holy *Honorius*, formerly high prieſt of the church

of

out any diminution, or without the hindrance of the ſaid abbot and convent."

"He ſhall alſo have the redemption of wool and of lambs, in every part of the pariſh, from number five and under, that is to ſay, where, by the cuſtom of the place, the tithe of the fleece cannot be got at by any other means, all kind of tithe ariſing as well from wool as lambs above five, according to the aforeſaid cuſtom, wholly remaining among the ſaid abbot and convent, as obſerved before, wherein we forbid ſtrictly all practice of impoſition and fraud, upon the ſevereſt penalty."

"We beſides ordain, that the abbot and convent before named, provide for the vicars to be ſucceſſively appointed, according to place and time, a convenient manſion houſe, in a proper ſituation, at the expence of the ſaid abbot and convent; and the ſame on the appointment of the next vicar, after the reſignation or deceaſe of *Simon*, the preſent vicar of the ſaid church of *Whaplode*, to be built and properly fitted up; afterwards, if accident, neceſſity, or length of time ſhould require the vicar for the time being to repair or rebuild, he ought ſo to do on the ſame ſpot before aſſigned. We beſides ordain, that the firſt vicar, after the reſignation or deceaſe of the ſaid *Simon*, to be appointed in perpetual ſucceſſion by the biſhop, and all his ſucceſſors, for the time being, maintain and acknowledge the uſual due, and accuſtomed epiſcopal and archdeaconal duties, and that they repair and provide books, veſtments, and other ornaments, and eccleſiaſtical neceſſaries; and alſo provide and maintain miniſters to officiate in the vicarage aforeſaid: and we will and do ordain that this our ordination have perpetual

perpetual force in all and singular the articles above-mentioned, always reserving episcopal customs, and the dignity of the church of *Lincoln*. And that this ordination may be relied on, and deemed a perpetual sanction to the said abbot and convent, and future vicars, we have caused these presents to be fortified by our seal. Done in the month of *January*, in the year of grace 1268, and the 11th of our pontificate."

The original instrument of the endowment of this vicarage, was produced in court upon the hearing, and authenticated; it was then upwards of five hundred and six years old, and seemed never to have seen the light for at least the greatest part of that time; the plaintiff's right under it, to all the tithes set forth in his bill, though never before paid or demanded, was allowed, and a decree given, ordering the defendants to account for them accordingly. *Bates. Agist.* 81, 82, &c.

But more frequently the manner in which the great and small tithes are, in endowments, appropriated and appointed to the rectors and vicars, is directly the reverse of that stated above; the particular tithe given to the vicar; or for the maintenance and support of the officiatory, are first expressly mentioned, and particularly specified, to which are added the general words, *cum toto alteragio*, &c. &c. or *cum omnibus aliis*, or, *cæteris minutis decimis*, &c. &c.

And then all other tithes are given or appropriated to the religious, the abbot and convent, *&c. &c.* from whom they have since come into the hands of the present impropriators, without particularly mentioning or specifying any.

In

In all ſuch endowments, either the word *alterage*, or, *minutæ decimæ*, with their adjunctives, have, in all caſes, where this tithe hath been claimed, ever been admitted to convey it to the vicar.

In ſome endowments, if ſuch total diſpoliations of churches of their tithes can be juſtly intitled to that name, the whole tithes are appropriated; and only a certain penſion or ſtipend, ſpecifically mentioned, to be paid annually by the appropriatee in money, or ſuch a particular quantity of corn, *&c. &c.* reſerved for the maintenance and ſupport of the officiating miniſter: the inſtances of this kind are very few, in compariſon of either of the other two. But wherever this is the caſe, the vicar or officiating miniſter is excluded from every tithe, alterage and emolument beyond the penſion, ſtipend, or annual payment ſo ſpecified.

Wherever therefore the tithes of any church are divided, and there is a vicarage endowed, in order to know how they were originally appropriated and apportioned, and to which, and to which only, therefore, the rector and vicar are now reſpectively intitled, the only way is to conſult the endowment; the original inſtrument, if yet exiſting, may be met with either in the regiſtry-office of the biſhop, or of the dean and chapter of the dioceſe, or augmentation-office, *New-Palace-Yard, London*; and a copy procured of ſuch endowment, from the regiſter of the ſaid office, or his deputy.

The firſt of the above-mentioned offices, is the moſt likely to meet with the endowments of all, or any particular vicarage, in any dioceſe; but ſuch as are not to be found in any of them, muſt either have

have been entirely loſt or deſtroyed, or carried to *Rome*, with many other records of the like nature, at the time of the diſſolution of the monaſteries, or not long after at the reformation.

It may, perhaps, be of ſome uſe and advantage here, to adviſe every vicar, who may chuſe to apply to any of the above offices for a copy of the endowment of his vicarage, to give particular directions to have what is called, *An extended copy*, that is, one which all the words are wrote out at full length.

For the originals are all in ſuch old, uncouth, obſolete latin, without either ſtops or capital letters, and in ſo very antique and uncommon a character, with all the words ſo abbreviated, that unleſs accuſtomed to the reading of ſuch writings, he will be able to make out a column of *Egyptian* hieroglyphics as ſoon as one ſentence of his endowment in its original ſtate. And it may, perhaps, be of equal uſe to both rectors and vicars, and their reſpective pariſhioners, to know of what conſequence theſe original endowments are; and in what deciſive authority they are held in all litigations reſpecting the rights of either, *in every court, and in every caſe where they can be produced*, viz.

That the firſt endowment cannot be preſcribed againſt. They are of ſuch authority as no time can deſtroy. *Nullum tempus occurrit talibus ordinationibus.*

In many caſes they have been admitted as ſufficient evidence, to give to the vicar tithes never before claimed; and to reſtore to him thoſe uſurped by the rector or impropriator.

The

The author hopes he ſhall be excuſed for mentioning here his own caſe, and his own caſe only; as he would not preſume to advance any thing for which he has not a proper voucher or document in his own hand.

The leſſees of the impropriators had, *time immemorial*, received *three-pence each*, as an agiſtment tithe, for all ſheep ſold or removed out of the pariſh in every year, *betwixt* Candlemas *and ſhearing time*.

This receipt, as it could not be denied, the plaintiff did not pretend to diſpute, but laid his claim generally for the tithe of the agiſtment of *all ſheep, from the time of their laſt ſhearing, till they were removed out of the pariſh before next ſhearing*; thus including all ſheep, at whatever time ſold or removed out of the pariſh, betwixt one ſhearing time and the next, whether before or after *Candlemas*.

The counſel for the defendants, the impropriators and their leſſees, long and ſtrenuouſly urged the having received, time immemorial, the tithe of agiſtment of ſheep, removed out of the pariſh, during the particular time of the year, *betwixt* Candlemas *and the next ſhearing*, uncontroverted and undiſputed by the vicar.

This receipt was proved in their behalf, by evidences and leaſes for at leaſt ninety years; a period, in modern days, ſufficient to eſtabliſh almoſt any right or mode of payment reſpecting tithes. But the original endowment, which was at the ſame time in court before the barons, though of five hundred and ſix years date, was admitted to have the *ſame authority then*, in all reſpects, as it had the very day after

after it was executed; and they, therefore, gave a decree, ordering an account to the plaintiff for the tithe of the agiſtment of all ſheep, ſold or removed out of the pariſh, betwixt one ſhearing time and the next, as well of thoſe ſo removed betwixt *Candlemas* and ſhearing, as at any other time of the year, in the words above-mentioned in the extract from the decree, by which the leſſees of the impropriators were to account to the vicar for the arrears, from the time of his induction, and to relinquiſh to him, for the future, their right to that part of one *ſpecies* of tithes prayed for generally in his bill, which they had received time immemorial; and to which, for that reaſon, neither any of his predeceſſors nor himſelf had ever demanded, nor even thought themſelves intitled.

Extract of a letter from the late R. * G—, *Eſq*; *to the Rev. Mr.* B——. *Batem.* App. 111, &c.

"The endowment is full, clear and explicit. By it the abbot and convent of *Croyland* are to have all the tithes of corn of your church, flax, hemp, wool, and lamb, in *velleribus lanæ ſcilicet et agnorum corporibus conſiſtentem.* This is the whole tithe that the impropriators have granted to them by that inſtrument."

"The vicar is thereby intitled to all the alterage of the ſaid church, and all emolument howſoever ariſing or coming from ſuch alterage, *quocunque nomine cenſeatur et in quibuſcunque conſiſtat vel conſiſtere poterit, abſolutè et inconcuſſè*; then comes the exception, *Decimis garbarum, lini, canopi, lanæ et agnorum, et etiam tota dominica terra cum juribus ſuis et appendiciis ut prædictum eſt, duntaxat exceptis.*"

* He was the plaintiff's ſolicitor.

" This is the whole of the endowment that is material to the preſent queſtion."

" Suppoſing a litigation to enſue concerning agiſtment tithe, the queſtions would, in my opinion, be two."

" 1. Whether ſuch tithe is due of common right, none having ever been paid? and

" 2. If due, *cui?*"

" The firſt is an indiſputable legal poſition, that ſuch tithe is due *communi jure* and *primâ facie*, of courſe to the incumbent."

" Are there any words in the endowment whereby ſuch tithe is granted to the abbot and convent, and conſequently to the impropriators? Certainly none. The words *garbarum*, *lini*, *et canapi*, will not carry the tithe contended for. The words *lanæ et agnorum* are particularly explained by the endowment *in velleribus*, &c. as above quoted. There is therefore no expreſs grant of this tithe, nor can the impropriators by any poſſibility be intitled to more than the above five *ſpecies* of tithes."

" Upon this footing I incline ſtrongly to think the incumbent alone is intitled. But the endowment goes further in favour of the vicar." " It makes uſe of very general and comprehenſive expreſſions; *qualitercunque proveniens*, *quocunque nomine cenſeatur*, *et in quibuſcunque conſiſtat vel conſiſtere poterit*, *abſolute et inconcuſſe*, and the exception which follows, with the word *duntaxat* added, muſt ſurely be ſufficient to preclude

clude the impropriators from any claim to the tithe in queſtion; or any other tithe, except the five particularly granted."

"It is no objection that it never had been paid or demanded. That was preciſely the caſe in Dr. * *W*——'s ſuit, and the counſel againſt us were aſhamed to rely upon ſo weak an argument, which all the barons ſcouted as ſoon as mentioned."

"It is eaſy to account for the terriers being ſilent as to the agiſtment tithe in queſtion. The incumbent poſſibly never dreamt of it: and the pariſhioners, in caſe they had known it, were too wiſe in point of worldly prudence, to put him in mind of it; and thereby render themſelves liable to the payment of a tithe which from the particular mode of ſtocking their lands would be a conſiderable burthen upon them."

"The firſt recital in the endowment mentions inſtruments relative to your pariſh having been made by *Hugh* Biſhop of *Lincoln* and pope *Honorious* in favour of the abbot and convent of *Croyland*. Can theſe be found among the archives of the biſhop of *Lincoln* or elſewere?"

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* See the cauſe of *Willis* againſt *Harvey*, and others, under *Michaelmas* Term, 9 *Geo.* III.

In the *Exchequer*.

Bateman, — . Plaintiff.

Aiſtrup, and others, — Defendants.

The PLAINTIFF'S * BILL *of* COSTS.

	£.	s.	d.
1769			
March 6, Paid poſtage of a letter from you -	0	0	4
7, Attending at the *Exchequer* office, *Weſtminſter*, to ſearch for bill filed 4 *James* II. *Thomas Clerk* againſt *Edwards*, and found it and wrote to you thereof -	0	6	8
Paid clerk in court his fee for ſearching for the above bill and paid court keeper -	0	10	8
1772			
Mar. 16, Searching at the *Exchequer* office two hours to ſee if the above cauſe had been proceeded in, but could not find that it had, and writing to you -	0	6	8
20, Paid poſtage of letter with terriers and the particulars of your demands incloſed -	0	0	8
Carried over	£. 1	5	0

* *Batem.* App. 117.

		£.	s.	d.
	Brought over	1	5	0
	Peruſing the terriers and wrote to you in full in anſwer - -	0	6	8
July 24,	Paid for letter incloſing your endowment one ſhilling, ditto terrier -	0	2	0
	Peruſing your endowment carefully and writing to you my opinion then from the country ſix ſhillings and eight-pence, ditto and cloſe copy caſe for council ten ſhillings	0	16	8
Sept. 25 and 26,	Attending in *Smithfield*, in purſuance of your letter, to find out one *Carter* a ſaleſman, but he being in the country, attending at his partner's in St. *John*'s *Square*, and afterwards at Mr. *Boys*, who ſaid the occupiers caſe was laid before Mr. *Huſſey*, and writing to you thereof	0	6	8
	Paid Mr. *Comyn* with your caſe -	2	2	0
	To his clerk two ſhillings and ſix-pence, attending him ſix ſhillings and eight-pence, fair copy of caſe and opinion three ſhillings and ſix-pence	0	12	8
	Carried over	£. 5	11	8

		£.	s.	d.
	Brought over	5	11	8
	Examining *Wright*'s Hiſtory of the Antiquities of *Rutlandſhire*, to ſee the account of the charities of *Uppingham* and *Okeham*, and writing ſeveral letters	0	6	8
1773	to you thereon -			
Mar. 27,	Attending Mr. *Rooke* at the *Rolls* Chapel to ſearch for the grant and foundation of the above charities	0	6	8
	Paid him for ſearch, but could not find it -	0	3	0
April 3,	Attending all the morning at the *Rolls* ſearching for the above, and inſpected the original grant -	0	10	0
	Paid Mr. *Rooke* for inſpecting the ſame -	0	10	6
	Fair copies of endowment and terriers to keep the original copies being ſent to you to ſhew the governors of the charities	0	7	6
Sept. 15,	Paid for poſtage of letters to this time * -	0	6	0
	Carried over	£. 8	2	0

* The author has here printed his bill of coſts exactly as it was, at ſeveral times, ſent him by his ſolicitor, till a little before his death; and by his ſucceſſor for the time ſubſequent. The reader will obſerve, that though this part of it extends till near the latter end of the year 1773, yet as none of the articles conſtitute any part of the proceedings in the cauſe, he imagines his ſolicitor, for that reaſon, kept them thus ſeparate. *Baten.* App. 119.

	£.	s.	d.
Brought over	8	2	0

MICHAELMAS TERM, 1770.

Taking inſtructions for bill	0	6	8
Drawing the ſame, fo. 39	0	19	6
Cloſe copy for your peruſal and approbation thirty-nine - -	0	6	6
Fair copy for counſel thirty-nine - -	0	6	6
Fair copy of endowment and terriers for ditto	0	7	6
Paid Mr. *Mansfield* to peruſe and ſign bill -	1	1	0
Attending him ſix ſhillings and eight-pence, ingroſſing the bill, fo. thirty-nine, thirteen ſhillings, parchment and duty four ſhillings - -	1	3	8
Filing the bill, allowing and fee to clerk in court	0	7	4
Two ſubpœnas nine ſhillings, term fee ſolicitor ſix ſhillings and eight-pence, letters and porters two ſhillings -	0	17	8
Retainer to Mr. *Comyn* for you one pound one ſhilling, to his clerk two ſhillings and ſix-pence, attending him ſix ſhillings and eight-pence -	1	10	2
Carried over	£. 14	8	6

	£.	s.	d.
Brought over	14	8	6

HILARY TERM, 1771.

Term fee, clerk, and solicitor, defendants having obtained an order for time	0	10	0
Letters and porters -	0	2	0

EASTER TERM, 1771.

Term fee, clerk, and solicitor, defendants having obtained an order for six weeks further time, ten shillings, letters and porters two shillings -	0	12	0

TRINITY TERM, 1771.

Term fee, clerk and solicitor, the governors answer being filed -	0	10	0
Letters and porters -	0	2	0

MICHAELMAS TERM, 1771.

Term fee, clerk and solicitor, the answer of the defendants, the occupiers, being filed, ten shillings, letters, *&c.* two shillings	0	12	0
Carried over	£. 16	16	6

	£.	s.	d.
Brought over	16	16	6
Paid Mr. *Wyche*'s bill attending as a commiſſioner to take the anſwer of the governors on your behalf, and for expences and carriage of anſwer. -	0	14	6

MICHAELMAS TERM, 1772.

Paid for office copy defendants the occupiers anſwer, fo. 94 -	4	6	2.
Cloſe copy for you -	0	15	8
Paid for office copy of the governors, anſwer, fo. 15 and duty -	0	13	9
Cloſe copy thereof for you	0	2	6
Term fee, clerk and ſolicitor	0	10	0
Letters and porters -	0	2	0

HILARY TERM, 1773.

Replication duty and filing	0	7	4
Copy rejoinder and duty	0	2	9
Term fee, clerk and ſolicitor	0	10	0
Letters and porters -	0	2	0

TRINITY TERM, 1773.

Paid regiſter for copy of defendants order to diſmiſs	0	2	10
Drawing inſtructions for counſel to ſhew cauſe againſt the order -	0	2	6
Carried over £.	25	6	6

	£.	s.	d.
Brought over	25	6	6
To counſel therewith -	0	10	6
Attending him and court, when on your undertaking to examine witneſſes and try the cauſe next term, time was given us Clerk and ſolicitor -	1	10	0
Order thereon -	0	8	6
Replications (duty and filing) to anſwer of the governors of the Free Grammar School of *Okeham*, &c. -	0	7	4
Copy, regiſter and duty, fo. 4. - -	0	3	8
Term fee, clerk and ſolicitor - -	0	10	0
Letters and porters -	0	2	0
Drawing brief of bill and anſwers, fo. 148 -	1	4	0
Fair copy thereof four brief ſheets - -	0	12	0

TRINITY VACATION, 1773.

Peruſing papers and inſtructions to enable me to draw interrogatories for the examination of witneſſes	0	6	8
Drawing interrogatories for the examination of witneſſes, fo. 13 -	0	4	4
Fair copy thereof to lay before counſel -	0	2	2
Carried over £.	31	7	8

	£.	s.	d.
Brought over	31	7	8
Paid Mr. *Ainge* to ſettle and ſign them	1	1	0
Attending him -	0	6	8
Ingroſſing the interrogatories	0	4	4
Parchment and duty -	0	4	6
Fair copy of the brief to you	0	12	0
The like of the interrogatories	0	2	2

MICHAELMAS TERM, 1773.

Paid for half commiſſion * to examine witneſſes, and oaths	0	13	8
Carried over £.	34	12	0

* The particulars of the expence of the plaintiff's part of the commiſſion here alluded to, the reader will find ſubjoined to this bill. For as the *plaintiff was his own ſolicitor* upon that commiſſion, and had the whole management and paid all the expence attending it himſelf, and it therefore made no part of his ſolicitor's bill, he thought it more proper, though ſomewhat out of order here, to print it by itſelf. He begs leave to obſerve that it was perhaps the only commiſſion of ſuch conſequence, and which continued ſitting full ſix days, that was ever executed, in which, on the plaintiff's ſide, *not one ſingle limb of the law* was at all concerned. *He was his own ſolicitor*, and his two commiſſioners were, the one a proctor in the ſpiritual court, the other, an honeſt, ſenſible country grazier, in the neighbourhood, neither of whom had ever acted on ſuch an occaſion before, nor in all probability ever will again. *Batem.* App. 123.

The editor of theſe caſes preſumes to add on the above reverend Gentleman's obſervation on his "*becoming his own ſolicitor*" and on "*not one ſingle limb of the law being at all concerned for him*, that by a perpetual law made in the reign of his late Majeſty King *George* the *ſecond*, *for the better regulation* of REAL *attornies* and *ſolicitors*, that in caſe any perſon in his own name, or in the name of any other perſon, ſhall proſecute or defend any action, or ſuit, or any proceedings, *in any court* of law or *equity*, as *an attorney* or *ſolicitor*, *without admiſſion*, every *ſuch perſon for every* ſuch *offence*

	£.	s.	d.
Brought over	34	12	0
Exchanging and ſtriking commiſſioners names	0	3	4
Paid bringing up the depoſitions	0	5	0
Oath of the meſſenger -	0	2	0
Filing depoſitions -	0	2	0
Marking book of depoſitions being publiſhed	0	3	4
Paidf or copy of depoſitions, fo. 194, and duty	8	17	10
Setting down cauſe for next Term	0	3	4
A diſtringas and two ſubœnas to hear judgment	0	13	6
Term fee and ſolicitor -	0	10	0
Letters and porters -	0	2	0

HILARY TERM, 1774.

Drawing brief of depoſitions for plaintiff and defendant, fo. 194 -	1	12	4
Two fair copies of brief, bill, anſwer, and depoſitions, nine ſheets -	2	5	0
Two copies of the endowment to annex thereto	0	3	4
Carried over £	47	14	2

fence ſhall *forfeit fifty pounds.* See Stat. 2 Geo. II. chap 23. ſect. 1. 24. which act of parliament is perpetuated by Stat. 30 Geo. II. chap. 19. ſect. 75. As the term *limb of the law* ſeems rather an *illiberal* expreſſion for the *ſuppoſed* education of a gentleman of Mr. *Bateman's* reſpectable rank in life, we dare ſay it is needleſs to notice it further, in order to convince him of the *indecency* of the term.

	£.	s.	d.
Brought over	47	14	2
Ditto of the terriers -	0	2	0
Ditto of your inſtructions which you thought neceſſary to add -	0	5	0
Attending you daily at Chambers and elſewhere while you was in town relative to this cauſe -	2	2	0
Drawing inſtructions for counſel to prove exhibits *viva voce* at the hearing	0	2	6
Paid Mr. *Ainge* to move	0	10	6
Attending him and court	0	6	8
Paid Mr. *Price* with his brief	6	6	0
Paid his clerk -	0	2	6
Attending him -	0	6	8
Paid Mr. *Ainge* with his brief	2	2	0
Attending him -	0	6	8
Term fee clerk in court and ſolicitor	0	10	0
Letters and porters -	0	2	0
Drawing inſtructions for counſel to move to adjourn cauſe to the firſt day of cauſes in next term	0	2	6
Paid counſel to move	0	10	6
Attending him and court when cauſe adjourned	0	13	4

EASTER TERM, 1774.

April 21,	Attending cauſe, part heard, clerk in court and ſolicitor	0	13	4
	Carried over £.	62	18	4

		£.	s.	d.
	Brought over	62	18	4
	Paid coach hire with the papers	0	2	0
	Attending at *Weſtminſter* to ſearch for ſeveral decrees, and making abſtracts of them, being caſes in point	0	13	4
	Paid for order to prove exhibits	0	6	10
	Paid regiſter for copy thereof and duty	0	2	10
April 23,	Attending Mr. *Price* at his chambers a long time to conſult about this cauſe	0	6	8
25,	Attending court when cauſe further heard, clerk in court and ſolicitor	0	13	4
	Coach hire with the papers	0	2	0
28,	The like cauſe heard and decree for plaintiff	0	13	4
	Paid court fees -	0	10	0
	Coach hire -	0	2	0
	Term fee, clerk in court, and ſolicitor	0	10	6
	Letters and porters -	0	2	0

TRINITY TERM, 1774.

	Paid for copy of minutes	0	2	6
	Cloſe copy thereof for you	0	1	0
	Drawing decree, fo. 55	2	15	0
	Fair copy for the other ſide	0	9	2
	Tranſcribing fair to enter and duty -	0	12	2
	Copy to keep -	0	9	2
	Carried over	£. 71	0	4

	£.	s.	d.
Brought over	71	10	4
Term fee, clerk in court, and ſolicitor	0	10	0
Letters and porters *	0	2	0

MICHAELMAS TERM, 1774.

Writing ſeveral times to plaintiff for inſtructions to draw his charge	0	13	4
Drawing the charge, fo. 27, and fair copy for the maſter	0	13	6
Cloſe copy ſent to plaintiff	0	4	6
Paid for decree -	1	19	8
Warrant on leaving charge, copy and ſervice	0	3	0
Copy, ordering part of decree for the maſter	0	2	6
Carried over £.	75	18	10

* The plaintiff's firſt ſolicitor lived only juſt long enough to pilot his client within ſight of land; for he did not long ſurvive the obtaining the decree, and the reader will find the plaintiff had afterwards to ride over a rough ſea, and beat up againſt a ſtrong ſhore wind, before he got ſafely landed.—The cauſe after the decree came into different hands, and in conſequence, as it will be obvious, was conducted in a ſomewhat different manner. The bill is caſt up to this period, to point out to the reader the whole of his firſt ſolicitor's charge, till after the decree, *viz.* ſeventy five pounds ſeven ſhillings, *Batem.* App. 126.

The plaintiffs whole expence then of the ſuit will ſtand in abſtract thus:

	£.	s.	d.
Solicitor's bill till after the decree - -	75	7	0
Commiſſion previous to it - -	48	10	1
Solicitor's bill from the time of the decree, till the final winding up of the cauſe	49	5	5
	173	2	6

But

		£.	s.	d.
	Brought over	75	18	10
Dec. 13,	Warrants to proceed thereon, copy and ſervice	0	3	0
	Attending thereon -	0	6	8
	Paid for another copy decree, the former being miſlaid	0	12	2
	Term fee, clerk in court, and ſolicitor	0	10	0
	Letters and porters -	0	2	0

HILARY TERM, 1775.

Jan. 25,	Warrant to proceed on charge, copy and ſervice	0	3	0
27,	Attending thereon, but not attended on the other ſide	0	6	8
	Warrant to proceed on charge, copy and ſervice	0	3	0
28,	The like - -	0	6	8
Feb. 3,	Attending warrant on charge, but maſter at defendants requeſt would not proceed thereon, without a commiſſion for examination of witneſſes for defendants	0	6	8
	Carried over	£. 78	18	8

But the reader ought here to remember, that as the plaintiff was all along *his* * *own attorney in the country*, nothing is here charged for all his time, trouble, writing, journies, and many little incidental expences, of which he kept no account. And he begs leave here to obſerve, that he has reaſon to believe, that no cauſe of ſuch length and magnitude was ever got through at ſo little expence; and he has equal reaſon to believe, no one ſimilarly circumſtanced will ever be got through for leſs; but how much more any bill in the court of *Exchequer* of *any* length and magnitude may occaſion either of the parties, he is ſo far from being anſwerable, that he will not take upon him even to hazard a conjecture. *Batem.* App. 127.

* See *Eaton*, Agiſt. 98.

	£.	s.	d.
Brought over	78	18	8
Writing a letter to you to acquaint you thereof	0	6	8
Close copy ordering part of decree for you	0	2	6
Term fee clerk in court and solicitor	0	10	0
Letters to porters -	0	2	0

EASTER TERM, 1775.

Paid for a copy of the depositions of the defendants part, after the decree, fo. 246, and duty	11	5	6
Drawing brief thereof to proceed upon the charge	1	3	8
Fair copy brief for my use four brief sheets	0	10	0
Term fee clerk in court and solicitor	0	10	0
Letters and porters -	0	2	0

TRINITY TERM, 1775.

June 21, Warrant for *June* 26th, to proceed on charge copy and service	0	3	0
26, Attending thereon, and charge proceeded in	0	6	8
Same day warrants for *Thursday* 29th, copy and service -	0	3	0
Carried over	£. 94	3	8

	£.	s.	d.
Brought over	94	3	8
29, Attending thereon, and proceeded in charge, when maſter took further time to conſider of the allowance -	0	6	8
Same date, paid for another warrant to proceed, copy and ſervice	0	3	0
Drawing interrogatories for the examination of the defendants under the decree, fo. 12	0	4	0
Fair copy thereof for counſel to peruſe, ſettle and ſign - -	0	2	0
Paid counſel therewith	1	1	0
Attending therefore -	0	6	8
Fair copy of interrogatories for the maſter	0	2	0
Warrant on leaving the ſame, copy and ſervice	0	3	0
Warrant to ſettle the ſame, copy and ſervice	0	3	0
Another warrant to ſettle the ſame, copy and ſervice - -	0	3	0
Paid for office copy thereof	0	8	0
Paid the maſter for his report of allowing interrogatories -	1	5	0
Signing report -	0	2	0
Carried over £.	98	13	0

	£.	s.	d.
Brought over	98	13	0
Paid maſter ingroſſing interrogatories	0	8	0
Parchment and duty	0	2	0
Term fee, ten letters and porters, two ſhillings	0	12	0
Copy of Mr. *Watſon*'s account of ſheep fed, &c. by him in *Whaplode*, being very long	0	5	0
Ditto of *Robert Collins*	0	5	0

MICHAELMAS TERM, 1775.

Paid for copy of the examination, fo. 109, and duty -	4	19	11
Paid for copy of the ſchedule and duty, fo. 65	2	7	4
Copy of the examinations for my own uſe	0	18	2
The like of the ſchedule	0	10	10
Warrant in plaintiff's charge, copy and ſervice	0	3	0

HILARY TERM, 1776.

Warrant to proceed on charge, copy and ſervice	0	3	0
Attending thereon, when three farthings *per* head was agreed upon for the agiſtment of ſheep	0	6	0
Carried over £.	109	13	3

		£.	s.	d.
	Brought over £.	109	13	3
	Wrote to you how to charge barren beaſt, copy of *Aiſtrup*'s, *Goulding*'s, *Collin*'s, and *Watſon*'s examinations and ſchedule	1	9	0
	Term fee, clerk in court and ſolicitor -	0	10	0
	Letters and porters -	0	2	0

EASTER TERM, 1776.

	Term fee, clerk in court and ſolicitor proceedings had	0	10	0
	Letters and porters - -	0	1	0

TRINITY TERM, 1776.

	Term fee commiſſion -	0	10	0
Sept. 23.	Fair copy of your caſe with reſpect to the conſtruction of the decree to lay before Mr. *Kenyon*	0	2	6
	Paid him therewith and to his clerk - -	1	3	6
	Attending him therewith -	0	6	8
Sept. 24,	Cloſe copy of a caſe with Mr. *Kenyon*'s opinion thereon for you - -	0	2	6
	You having ſome doubt reſpecting the opinion of Mr. *Kenyon*, and wiſhing him to reviſe the ſame, fair copy of another caſe ſent up by you to be laid before him - -	0	4	6
	Carried over £.	114	4	5

	£.	s.	d.
Brought over	114	4	5
Paid him therewith and to his clerk - -	1	3	6
Attending him therewith -	0	6	8
Fair copy of case with his opinion thereunder for you - -	0	4	4
Letters and porters - -	0	2	0

MICHAELMAS TERM, 1776.

Warrant to proceed in plaintiff's charge, copy, and service - -	0	3	0
Making extract from your letter to lay before the deputy remembrancer for his opinion respecting your claims under the decree and attending him therewith * - -	0	6	8
Nov. 26, Warrant to proceed on charge, copy and service	0	3	0
Dec. 7, Warrant for the master's opinion on the construction of the decree respecting yours and the impropriator's different rights, copy and service	0	3	0
Carried over £.	116	16	7

* The reader will observe that all the subsequent expences incurred are merely extraneous, and were occasioned by the governors; the impropriators and their solicitors objecting to the decrees at all interfering with their right to the three-pence *per* head, for the agistment of all sheep removed out of the parish, each year, betwixt *Candlemas* and shear-time, as has before been explained. *Batem.* App. 132.

	£.	s.	d.
Brought over	116	16	7
12, The like copy and ſervice	0	3	0
17, Attending the deputy remembrancer for his opinion on the words of the decree, when he was of opinion the plaintiff was intitled - -	0	6	8
Drawing a certificate of the maſter's opinion to be ſigned by myſelf and defendant's ſolicitor	0	2	6
Two fair copies thereof	0	1	0
Attending defendant's ſolicitor ſeveral times to ſign the ſame - -	0	13	4
Term fee, clerk in court and ſolicitor -	0	10	0
Letters and porter -	0	2	0
Writing ſeveral letters to you in the courſe of this cauſe, and adviſing you how to conduct yourſelf therein, and paid coach hire, poſtage of letters, meſſengers, and other incidental expences -	2	2	0
Total £.	120	17	1

Expence of the plaintiff's part of the commiſſion previous to the decree in the court of Exchequer, in the cauſe of Bateman *againſt* Aiſtrup *and others, holden at* Foſdike *from* Monday *the 1ſt, till* Saturday *the 6th day of* November, 1773, *both days inclusive.*

	£.	s.	d.
To commiſſioner *F*——— ſix days attendance, and two days journey, one coming the day before to attend, the other the day after, returning from the commiſſion - -	8	8	0
His expences on the road -	1	15	6
To commiſſioner *N*——— ſix days attendance	6	6	0
To 1ſt clerk to the commiſſioners eight days	4	4	0
Second do. to do. four do. -	2	2	0
To Mr. *B*——— deputy regiſter, for exhibiting on commiſſion the original endowment and terrars	2	2	0
To parchment for ingroſſing depoſitions - -	0	9	0
To expences of evidences attending - -	2	1	6
Landlord's bill on plaintiff's account during the ſitting of the ſaid commiſſion, ſix days -	19	17	1
Servants on plaintiff's account - -	1	5	0
	£. 48	10	1

Eaſter Term, 15 Geo. III.

May 22, A. D. 1775.

In the *Exchequer*.

* Sir *Sidney Stafford Smythe*, Lord Chief Baron,
Sir *James Eyre*,
Sir *John Burland*,
Sir *Beaumount Hotham*.

Edward Thurlow, Attorney General.
Alexander Wedderburn, Solicitor General,
John Glynn, Serjeant at law, Recorder of *London*,

Bryan Allott, Clerk, ——— Plaintiff.

Pinckney Wilkinſon, Eſq; —— Defendant.

*** *The caſe of the plaintiff, extracted from the printed appeal; delivered to the Lords, counſel and parties concerned, previous to the hearing, with the manuſcript judgments of the Houſe indorſed thereon.*

THE plaintiff, *Bryan Allot*, clerk, was, on 29 *January* 1766, inſtituted, and on 4 *March* following, duly inducted into the rectory and pariſh church of the conſolidated pariſhes of *Burnham Saint Mary's*, otherwiſe *Burnham Weſtgate* and *Ulph*, in

* The above is extracted from "The *Nomenclature* of *Weſtminſter hall*," annexed to "The Biographical Hiſtory of Sir *William Blackſtone*." Octavo edit. 1782.

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the county of *Norfolk*, and thereby became intitled to all the glebe lands belonging to the ſaid rectory and conſolidated pariſhes.

The glebe lands belonging to the ſaid conſolidated pariſhes, and the rectory thereof, do principally conſiſt of a great number of ſmall pieces of land, lying diſperſedly in and over the open and common fields, within the ſaid conſolidated pariſhes, containing, in the whole, upwards of one hundred acres; which pieces and parcels of land, or more of them, had certain marks, metes, and boundary marks to aſcertain the ſame, and the length, breadth, and extent thereof.

Ever ſince, and for ſome years before the plaintiff's induction into the ſaid rectory and pariſh church, the defendant hath been the owner and proprietor of a conſiderable eſtate, lying within the ſaid conſolidated pariſhes, or one of them, of the yearly value of one thouſand pounds, or thereabouts; and particularly of a great number of pieces or parcels of land, lying diſperſedly in and over the open and common fields, within the ſaid conſolidated pariſhes, intermixed with, or adjoining to which the greater part of the glebe lands lie, part of which eſtate and lands the defendant let and now lets out to tenants, and other part thereof he had kept and now keeps in his own occupation and manurance.

The defendant taking advantage of the negligence of the plaintiff's predeceſſors, the rectors of the ſaid pariſhes, and having conſiderable influence over them by reaſon of his being poſſeſſed of a large eſtate in the ſaid conſolidated pariſhes, and by various other means, has got into his hands and poſſeſſion, and hath let to ſeveral of his tenants, together with other lands

lands of his own, and hath kept in his own occupation and manurance a great number of the ſaid pieces or parcels of glebe lands, which lay near to, or intermixed with, his own lands, and hath plowed up, defaced, or otherwiſe deſtroyed, and taken away the ſeveral mier-balks and dool-ſtones, which ſerved as metes and marks, by which the ſame were formerly aſcertained and bounded, or hath given directions to his ſervants to plow up the ſame, by reaſon of which, and of the ſeveral lands next adjoining thereto having paſſed through a variety of hands, and having been the property of different perſons at different times, ſince any terrier was made, or taken, of the glebe lands belonging to the ſaid rectory and pariſhes, the plaintiff being newly come into the ſaid rectory, and ignorant of the particular pieces of glebe land which belonged to the ſame, was unable to diſcover or diſtinguiſh ſuch glebe lands, or to bring any ejectment for them, or recover poſſeſſion thereof at law; and the defendant never having, ſince the complainant was inducted into the ſaid rectory, paid to the plaintiff any rent, or made any other ſatisfaction for the uſe and enjoyment of the ſaid glebe lands, ſo held and enjoyed by him or his tenants, nor for the *Eaſter* offerings, and other eccleſiaſtical dues, belonging to the plaintiff as rector of the ſaid pariſhes, although frequently applied to ſo to do,

The plaintiff on 1 *February*, 1771, filed his bill in the court of *Exchequer*, ſetting forth (amongſt other things) the ſeveral matters before mentioned, and praying that the defendant might be decreed to pay to the plaintiff a reaſonable rent or ſatisfaction for the ſeveral glebe lands belonging to the rectory of tha ſaid conſolidated pariſhes, held, enjoyed, demiſed,

or

or let by the defendant, from the time the plaintiff became intitled to ſuch glebe lands, and that he might be deſired to deliver up poſſeſſion thereof, and the ſeveral terriers, maps, plans, and field books thereof to the plaintiff; and alſo to reſtore, or ſet up, or make anew the ſeveral proper metes, boundaries, and other marks of the ſame, which had been plowed up, defaced, taken down, or deſtroyed by the defendant, or by his order and directions; and for an account of the ſmall tithes, *Eaſter* offerings, and other eccleſiaſtical dues, and for ſuch other relief as to the barons of the ſaid court ſhould ſeem meet.

The defendant appeared to the ſaid bill, and on 6 *September*, 1771, put in his anſwer thereto, and thereby admitted, that the plaintiff was duly inducted into the ſaid rectory and pariſhes, at the time in the bill mentioned, and that he thereby became intitled to all the glebe lands belonging to the ſaid rectory and pariſhes, and the great and ſmall tithes, and *Eaſter* offerings ariſing and growing within the ſaid rectory, and the titheable places thereof, and denies that he or any of his tenants was in poſſeſſion of any of the glebe lands belonging to the ſaid rectory or pariſhes, and the defendant thereby admitted to have in his cuſtody a map or plan of the ſaid conſolidated pariſhes, which appeared, from the date thereof, to have been made in the year 1648, and is *intituled*, "An exact deſcription of the pariſhes of *Burnham Weſtgate*, and *Burnham Norton*, in the county of *Norfolk*, ſetting forth their joint and ſeveral lines of perambulation, with all the parcels of land as they are now divided, within the ſaid pariſh of *Burnham Weſtgate*, and part of the parcels of land lying within the ſaid pariſh of of *Burnham Norton*; and alſo ſome parcels of land lying in the adjoining pariſhes,

riſhes, meaſured, ſurveyed, and delineated, at the appointment of *Thomas Seame*, Eſq; lord of the lordſhips and manor of *Raynham*, alias *Lexham*, alias *Burnham Laxbams* and *Pelſtead-hall*, lying within the ſaid pariſhes, *per Johannem Kerry, Philomathemat.*" and that it appeared by the ſaid map, that there were ſeveral parcels of glebe land belonging to the ſaid rectory, lying diſperſedly in ſmall pieces, in the ſeveral fields, within the ſaid pariſhes, which pieces of land were particularly diſtinguiſhed in the adjoining lands by certain marks or letters, which aſcertained them to be glebe.

The plaintiff took exceptions to the ſaid anſwer, and the defendant put in a further anſwer to the plaintiff's bill on 25 *January*, 1773, therein ſetting forth (amongſt other things) an account of the ſeveral farms and lands, occupied by him ſince the time of the plaintiff's induction into the ſaid rectory, AND DENIED that any of the metes or boundary marks belonging to the ſaid glebe lands had ever been plowed up, defaced, or deſtroyed by him, or any of his anceſtors or predeceſſors.

Iſſue was joined in the ſaid cauſe, and witneſſes examined on both ſides, on which examination the following proofs were made on the part of the plaintiff, by a variety of witneſſes, that during the incumbency of former rectors of the ſaid rectory, there were various pieces of glebe lying interſperſedly in the open and common fields of the ſaid pariſhes, ſome parcels of which the ſaid rectors at times kept in their own hands, and let other parcels off to the defendant's tenants; that formerly, there were mier-balks, and other marks, by which the ſaid glebe lands were bounded,

bounded, and could be diſtinguiſhed; that theſe mier-balks were ſince plowed up and deſtroyed, and ſome of them by the defendant's expreſs orders and directions, and that he and his tenants were now in poſſeſſion of many pieces of the ſame glebe land, which had been in the occupation of, or let off by former rectors, and that the whole of the ſaid glebe land in the poſſeſſion of the defendant, or his tenants, amounted to about ninety acres.

The cauſe was heard before the barons of the ſaid court of *Exchequer*, 22 *May*, 1775, when it was ordered, adjudged, and decreed by the court, that it ſhould be, and it was thereby referred to a trial at law, in a feigned action to be for that purpoſe brought in the office of pleas of the ſaid court, upon the following iſſue (to wit)

"*Whether the defendant* Pinckney Wilkinſon, *Eſq; or his tenants, be in the poſſeſſion of ninety acres of glebe lands belonging to the plaintiff, as rector of the conſolidated pariſhes of* Burnham Saint Mary's, *otherwiſe* Burnham Weſtgate, *and* Ulph, *in the county of* Norfolk;" and if the jury ſhould find that any more or leſs than ninety acres of glebe lands be in the poſſeſſion of the ſaid defendant, or his tenants, the ſame was to be indorſed on the *poſtea*; and that the ſaid iſſue ſhould be tried at the ſaid then next *Lent* aſſizes, to be held in and for the county of *Norfolk*, by a ſpecial jury of the ſaid county, and that a view of the premiſes ſhould be had on 25 *March* then next, by ſix of the jurors firſt named on the pannel, to be returned by the ſheriff of the county of *Norfolk*, for the trial of the ſaid iſſue, or by ſuch of them, or by as many more of them, as ſhould attend for that purpoſe; and the court directed an account to be taken of the ſmall tithe, *Eaſter* offerings, and other eccleſiaſtical dues, and

and ordered the defendant to pay the plaintiff his coſts of the ſuit to that time, and reſerved the conſideration of ſubſequent coſts, and further directions, till after the ſaid trial.

In purſuance of the above decree, the ſheriff of the ſaid county of *Norfolk* ſummoned the jurors to attend on 25 *March*, in order to take a view of the premiſes, as directed by the decree, and only five of ſuch jurors attended, whereupon the defendants attorney objected to any view being taken by ſuch jurors, as the number of jurors directed by the decree did not attend.

The time for ſuch view was enlarged till 10 *July* laſt, when a view of the premiſes was had.

The ſaid iſſue came on to be tried at the laſt ſummer aſſizes before Mr. Sergeant * *Sayer*, one of the juſtices aſſigned to hold the aſſizes for the county of *Norfolk*, by a full ſpecial jury of the ſaid county, ſix of which jurors had attended upon the view, when a great number of witneſſes were examined touching the matter of the ſaid iſſue, and proved, that the plaintiff was, at the time before mentioned, duly inducted into the rectory of the conſolidated pariſhes of *Burnham Saint Mary's*, otherwiſe *Burnham Weſtgate*, and *Ulph*, together with *Burnham Norton*, was conſolidated with, and had conſtantly paſſed, by the ſame inſtitution, with the two former pariſhes for a long time paſt, as was proved by the inſtitution book of the right reverend the Biſhop of *Norwich*, in

* See "The *Nomenclature* of *Weſtminſter-hall*," at the end of "The Biographical Hiſtory of Sir *William Blackſtone*." Octavo edit. 1782.

whoſe

whoſe dioceſe the ſaid conſolidated pariſhes lie. The before mentioned map or plan was at the trial produced to the jury from the cuſtody of the defendant (being an exact deſcription of the ſaid pariſhes made in the year 1648, by the appointment of the then lord of the manor, who was likewiſe the principal owner of the lands within the ſaid pariſhes, of which manor the defendant is now lord), by which map it appeared, that there were at that time ſeveral parcels of glebe lands lying interſperſedly within the ſaid conſolidated pariſhes, which ſaid glebe lands were particularly marked and bounded, and by being compared with and meaſured by the lines of the ſaid map, by a ſkilful land ſurveyor, were found to amount in the whole to ninety acres, or thereabouts; the plaintiff likewiſe produced a terrier of the glebe lands belonging to the ſaid rectory, exhibited at the ordinary viſitation of the lord biſhop of the dioceſe in the year 1706, and proved by the biſhop's regiſter, who attended for that purpoſe; which ſaid terrier was not only ſigned by the then rector and churchwardens, but likewiſe by ſome of the principal inhabitants of the ſaid conſolidated pariſhes, by which it appeared, that there were at that time various pieces of glebe lying in different parts of the fields of the ſaid pariſhes, amounting to very nearly the ſame quantity, in the whole, as was aſcertained by the meaſurement of the map, and it being proved by the teſtimony of ſeveral witneſſes, that many pieces of the ſaid glebe lands were in the poſſeſſion of the defendant, or his tenants, and that he had cauſed many of the mierbalks and boundaries to be plowed up and deſtroyed, and no contradictory evidence being produced on the defendant's part, the jury found that the defendant was by himſelf, and his tenants, in the poſſeſſion of eighty-four acres of glebe land belonging to the plain-

plaintiff as rector of the ſaid conſolidated rectory, and gave a verdict for the ſame accordingly, as by the *poſtea* and the judge's certificate appears.

The defendant on 15 *November* laſt obtained an order of the ſaid court of *Exchequer* for the plaintiff to ſhew cauſe, on that day ſevennight, why a new trial of the iſſue directed by the decree, *ſhould* not be granted, which order was enlarged to 4 *Feb.* laſt, when the plaintiff ſhewed cauſe why a new trial ſhould not be granted; whereupon, and upon Mr. Baron *Perryn*'s reporting the evidence on the trial of the ſaid iſſue, and the matter being fully argued before the barons of the ſaid court, they allowed of the cauſe ſo ſhewn by the plaintiff, and ordered that * no new trial ſhould be granted.

The caſe of the defendant, extracted from his printed appeal, delivered to the Lords, counſel, and parties concerned, previous to the hearing, with the manuſcript judgments of the Houſe indorſed thereon.

The defendant, in *February* 1752, purchaſed the eſtate, out of which the plaintiff claims the glebe land in queſtion, under a decree of the high court of *Chancery*, and upon the credit of a particular delivered at the maſter's office in the uſual manner, ſpecifying the number of acres in each farm, which the defendant hath accordingly propoſed from that time to this.

The plaintiff by his bill filed in the *Exchequer* againſt the defendant ſets forth, that in *March* 1766,

* It is not uſual, I believe, for a court of juſtice to make any order, when they totally deny the motion. *J. R.*

that

that the plaintiff was inducted into the rectory and pariſh church of the conſolidated pariſhes of *Burnham Saint Mary*, otherwiſe *Burham Weſtgate* and *Ulph*, in the county of *Norfolk*, and thereby became intitled to the glebe lands, and the great and ſmall tithes, and other ecclefiaſtical dues thereof, and alſo that the glebe lands belonging to the ſaid pariſhes, conſiſted of ſmall pieces of land, lying diſperſedly in the common fields, containing about one hundred acres; and had formerly certain metes and bounds to diſtinguiſh the ſame.

That the defendant for ſeveral years before, and ſince the plaintiff was inducted into the rectory and pariſh church, was poſſeſſed of a conſiderable eſtate in the ſaid pariſhes, conſiſting of a great number of pieces of land, diſperſed in the ſaid open and common fields, intermixed with, or adjoining to which, all or moſt of the glebe lands lay; that the defendant let out part of his lands to tenants, and kept part thereof in his own manurance, and that the defendant taking advantage of the plaintiff's predeceſſors, and having formerly rented ſuch glebe lands, had got the ſame into his poſſeſſion, and let ſome of the ſaid glebe lands, together with his own, to ſeveral of his tenants, and kept the reſt in his own hands; and that the metes and bounds being deſtroyed, the plaintiff was unable to diſtinguiſh which were glebe lands, to bring an ejectment for them, and that the defendant refuſed to pay him rent for the ſame, or ſet out ſuch lands.

And alſo charging ſeveral matters relating to tithes and *Eaſter* offerings; the plaintiff by his bill prayed, That the defendant might pay rent for the glebe lands ſo in his poſſeſſion, from the time the

plaintiff's right accrued, and deliver up to the plaintiff the poſſeſſion thereof, and diſcloſe the metes and bounds, and diſcover and account for the ſaid tithes and *Eaſter* offerings.

The defendant appeared, and put in his anſwer to the ſaid bill, and thereby admitted, that the plaintiff was rector of the ſaid pariſhes, and thereby intitled to all the glebe lands belonging to the ſaid rectory, and to the great and ſmall tithes, and other eccleſiaſtical dues thereof.

The defendant did not know whether the glebe lands belonging to the ſaid pariſhes, did or did not lie diſperſed in and over the open and common fields within the ſaid pariſhes, or whether they did or did not contain one hundred acres, or what other number of acres, or whether they had not certain marks, metes, and boundary marks, to aſcertain the ſame, but had ſeen a copy of a terrier, dated 23d *June*, 1753, whereby the glebe lands were made forty-nine acres, two roods, twenty poles, lying diſperſed in the fields.

The defendant admitted he was owner of an eſtate, and of a great many parcels of land lying diſperſed in the common fields, but did not know whether the ſame were intermixed with, or adjoined to the glebe lands, and having purchaſed the ſaid eſtate as aforeſaid, denied that he or his tenants, to his knowledge or belief, had any of the ſaid lands in his occupation, or that the defendant had defaced any of the land-marks, and believed the lands could not be diſtinguiſhed from any other lands lying in the ſaid fields, and did not claim title to any lands that had not been fairly and *bona fide* conveyed to him.

That

That he had heard and believes, that the late incumbent Mr. *Smith* *, ſome time in the year 1761, before his death, procured a commiſſion to be iſſued out of the eccleſiaſtical court of *Norwich*, to certain commiſſioners, upon a petition of the defendant and himſelf, to enquire and aſcertain what were the glebe lands within the ſaid conſolidated pariſhes belonging to the rector thereof; but though endeavours were uſed, as the defendant was informed, to aſcertain what were the glebe lands belonging to the ſaid pariſhes, and the quantity, value, and ſituation thereof, yet they could not be found, therefore no further proceedings were had, or the commiſſion returned.

Upon the hearing of the cauſe, the court of *Exchequer* did, on 22d *May*, 1775, order and decree, that it ſhould be referred to a trial at law in a feigned action, to be for that purpoſe brought in the office of Pleas of the ſaid court, upon the following iſſue, (to wit)

"*Whether the defendant, by himſelf or his tenants, was in poſſeſſion of ninety acres of glebe lands belonging to the plaintiff as rector of the conſolidated pariſhes of* Burnham Saint Mary, *otherwiſe* Burnham Weſtgate *and* Ulph, *in the county of* Norfolk;" and if the jury ſhould find, that any more or leſs than ninety acres of glebe land were in the poſſeſſion of the defendant or his tenants, that the ſame ſhould be endorſed on the *poſtea*, and that all books, papers and writings, in the cuſtody of either of the ſaid parties, ſhould be produced at the trial.

* *N. B.* The ſaid *Mr. Smith* had been eighteen years in poſſeſſion of the map hereinafter mentioned, before it was delivered to the defendant; and by agreement between the defendant and Mr. *Smith*, forty-nine acres, two roods, twenty poles, were ſet out for his glebe land in one piece; but he died before he came to actual poſſeſſion.

The ſaid iſſue was tried at the ſummer aſſizes 1776, for the county of *Norfolk*, before Mr. Serjeant *Sayer*, by a ſpecial jury, when ſeveral matters were given in evidence for the plaintiff, and particularly a terrier of 5th *June*, 1706, mentioned in the * appendix, ſigned by the rector, the two church-wardens, and ſome others of the inhabitants, which was objected to by the defendant's counſel, as neither the owner nor occupier of the lands, now in the eſtate of the defendant, had ſigned the ſame; but the judge was of opinion, that as the terrier was ſigned by the church-wardens, and other inhabitants, that it was good evidence; the ſaid terrier contained ſixty-three acres of land abutted, and twenty acres in certain lands called the *Brecks* and *Fould Courſes*, not abutted.

The next evidence produced by the plaintiff, was a map †, intituled, "An exact deſcription of the pariſhes of *Burnham Weſtgate*, and *Burnham Norton*, in the county of *Norfolk*, ſetting forth their joint and ſeveral lines of perambulation, with all parcels of land, as they were then divided, lying within the ſaid pariſh of *Burnham Weſtgate*, and part of the parcels of land lying within the ſaid pariſh of *Burnham Norton*; alſo ſome parcels of land lying in the adjacent pariſhes, ſurveyed, meaſured, and delineated, at the appointment of *Thomas Seame*, Eſq; lord of the lordſhips and manors of *Reynham*, alias *Lexhams*, alias *Burnham Lexhams*, and *Polſtead Hall*, lying with-

* Which ſee ſubjoined to the appellant's caſe, under *Hilary* Term, 17 *Geo.* III.

† This map had been in the poſſeſſion of Mr. *Smith*, the late rector, and was left by him in the manſion-houſe, when the ſame was purchaſed by the defendant, till the year 1754, when, being found by the defendant's ſteward, it was redelivered to the ſaid Mr. *Smith*, who, in 1761, gave the ſame to the defendant, ſome little time before his (Mr. *S.*'s) death.

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in the ſaid pariſhes, A. D. 1648, *per John Kerſy*, Philomath," was produced by the defendant, in obedience to the order of the court of *Exchequer*.

The defendant's counſel objected to the map being admitted as evidence; but the judge, not thinking it neceſſary to decide, whether the map was ſtrict legal evidence or not, declared his opinion, that, as by the order of the court of *Exchequer* (which was a court of equity, and therefore allowed a greater *latitude of evidence) the defendant was directed to produce at the trial, maps, field books, and papers, and had produced that map, *it was admitted evidence*.

In the ſaid map, the glebe † lands of the rector of *Burnham Weſtgate*, were marked with the letter (*M.*) thoſe of the rector of *Burnham Norton*, with the letter (*N.*) and thoſe of the rector of *Burnham Ulph*, with the letter (*O.*) but the quantity of ſuch piece was not expreſſed.

John Willoch, a land ſurveyor, a witneſs for the plaintiff, depoſed, that, upon meaſuring the lands marked *M. N.* and *O.* in the map, by a ſcale, he found the quantity of the lands abuttalled ſixty-four acres, and thirty-four poles, and the quantity of

* I always underſtood, that courts of *equity* held themſelves ſtrictly bound to adhere to the rules of *law*, as to *evidence*; and that their order for the production of books, papers, *&c.* on a trial at law, did not prevent their being rejected as evidence, becauſe ſuch order is *of courſe*, and only directs the mere production of them; for otherwiſe *deeds* ordered to be produced, muſt be received as evidence, though *unſtamped* or *forged*. *J. R.*

† *N. B.* The judge's report, read in the court of *Exchequer*, hath theſe words: "In the map, the glebe lands, lying in *Burnham Weſtgate*, were marked with the letter *M.* thoſe lying in *Burnham Norton* with the letter *N.* and thoſe lying in *Burnham Ulph* with the letter *O.*"

lands not abuttalled, twenty acres and twenty-ſix poles.

John Huggins, another witneſs for the plaintiff, depoſed, that he knew all the pieces ſo made up of the terrier, the map, and the ſurveyor, and proved the poſſeſſion of thoſe lands in the defendant or his tenants; the contents of each piece were taken down, not from the terrier, but from *Willoch*'s admeaſurement; and it appeared in many inſtances, upon compariſons, that the contents in the terrier did not agree with his admeaſurement, and that ſeveral pieces of land were marked *M. N.* and *O.* in the map, which were not mentioned in the terrier; ſo that the evidence of the terrier, the map, and the ſurveyor, contradicted each other.

Edward Merriment, another witneſs for the plaintiff and *Huggins*, the former witneſs, ſwore, that *mier-balks* had been ploughed up by the defendant's orders.

On the part of the defendant, two old terriers were produced, one of the year 1709, containing fifty acres, two roods, twenty poles; the other of the year 1716, containing forty-ſeven acres, one rood, twenty poles, and were both ſigned by the rector of the conſolidated pariſhes of *Burnham Saint Mary*, otherwiſe *Burnham Weſtgate* and *Ulph*, for the time being, and are ſet forth in the * appendix; and there are ten other ſucceeding terriers, none of which exceed fifty acres, and differ from each other only in ſmall quantities.

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* Which ſee immediately following the appellant's caſe, under *Hilary* Term, 17 *Geo.* III.

The

The defendant's witneſſes alſo contradicted the evidence which was produced on the part of the plaintiff, to ſhew, that the defendant had given orders to plow up the *mier-balks*, and in a particular inſtance the evidence of *Huggins* was invalidated; *Huggins* ſwore to the *plowing* up *mier-balks*, belonging to the glebe lands, by the order of the defendant's ſteward, *Henry Spooner*; and that he firſt objected thereto, but afterwards, by *Spooner*'s orders, ploughed up the ſame with tears in his eyes; this was flatly denied by *Spooner*, who poſitively ſwore he never gave ſuch orders.

Mr. *Solomon Fell*, a witneſs for the defendant, produced a grant in 4 *Eliz.* whereby *Richard Bunting* granted to *Edmund Barwell* the maſter, and the ſcholars of *Chriſt Church, Cambridge*, a moiety of the rectory of *Burnham*, otherwiſe *Burnham Saint Mary*, otherwiſe *Burnham Weſtgate*, with the appurtenances in *Burnham Saint Mary's, Norfolk*, and all the glebe lands, and a moiety of all the tithes thereof, and proved, that the maſters and ſcholars were purſuing their claim againſt the defendant, but the judge declared, that on the preſent iſſue no regard ought to be had to this grant, and gave directions to the jury,

That if any glebe land belonged to the rectory, in 1716, the plaintiff was intitled to it, though neither he nor his predeceſſors were in poſſeſſion of it, that the *difference* of the *terriers was immaterial*; that if the jury were not ſatisfied with the exact quantity, yet, as ſome glebe land had been proved to belong to the rector, they were to ſettle the quantity; that if they believed the defendant had ordered the *mier-balks* to be plowed up, and that the quantity could not be proved, it ſhould be taken moſt ſtrongly againſt the defendant; that if the defendant, or his

tenants, were in poſſeſſion of any of the lands of which the *mier-balks* had been ploughed up, the jury ſhould ſettle the quantity of thoſe lands.

That the jury went out, and ſoon afterwards returned, and aſked the judge how many acres the aſſociate had taken down, and he told them eighty-four, whereupon they brought in a verdict for eighty-four acres.

The defendant being diſſatisfied with the verdict, in that it found ſo large a quantity of land, as eighty-four acres to be in the poſſeſſion of the defendant, or his tenants, upon inſufficient evidence, and under the miſdirections of the judges, moved the court of *Exchequer*, on 15th *November* laſt, that a new trial might be granted of the iſſue directed by the ſaid decree, and an order was obtained for the plaintiff to ſhew cauſe, why a new trial ſhould not be granted.

Upon Mr. Baron *Perryn*'s reading Mr. Serjeant *Sayer*'s report of the evidence given on the trial, and on hearing counſel on behalf of the plaintiff, ſhewing cauſe againſt the laſt mentioned order, and reading the ſame, and alſo on hearing counſel on behalf of the defendant; it was therefore ordered, that the cauſe ſhewn againſt the ſaid order, ſhould be, and was thereby allowed, and that *no new* trial ſhould be granted.

See this cauſe on appeal from the above order, under Eaſter *Term*, 17 Geo. III.

Michaelmas

Michaelmas Term, 16 Geo. III.

December 4, A. D. 1775.

In the *Exchequer*.

* Sir *Sidney Stafford Smythe*, Lord Chief Baron.
Sir *James Eyre*.
Sir *James Burland*.
Sir *Beaumount Hotham*.

Edward Thurlow, Attorney General.
Alexander Wedderburn, Solicitor General.
John Glynn, Recorder of *London*.

Owen Lloyd, Clerk, — Plaintiff.

Hans Wintrop Mortimer, Esq; and *Robert Kirkman*, Gentleman, } Defendants.

The case of the plaintiff taken from the printed appeals delivered to the Lords, counsel, and parties concerned, previous to the hearing, with the manuscript judgments of the House indorsed thereon.

IN *Michaelmas*, 1773, the plaintiff exhibited his bill of complaint in his Majesty's court of *Exchequer*, as vicar of the parish of *Stapenhill*, in the county of *Derby*, against the defendants, setting forth, that the plaintiff was, and for several years last past had been, vicar of the said vicarage, and as such intitled, by endowment, prescription, or other-

* The above is extracted from "*The Nomenclature of* Westminster Hall, annexed to "The History of Sir *William Blackstone*." Octavo edit. 1782.

wise,

wiſe, to all tithes of hay and graſs, and clover cut for hay, and to all ſmall tithes ariſing, renewing, increaſing, and growing within the ſaid pariſh, and the titheable places thereof, and particularly within the village, townſhip, or hamlet of *Caldwall*, lying within, and parcel of the ſaid pariſh, and that the defendants had ſeverally been the owners and occupiers of divers farms, lands, and tenements within the ſaid hamlet, and that from *Midſummer* then laſt paſt, the defendants had divers titheable matters and things, ariſing, renewing, and growing on the lands occupied by them in the ſaid pariſh, the tithes whereof became due, and ought to have been paid to the plaintiff; it was therefore prayed, that the defendants might be decreed to account with the plaintiff, for the value of the ſaid titheable matters and things, and might pay to him what ſhould appear to be due on the taking ſuch account.

The defendants, by their anſwer to the ſaid bill, ſaid, that they were occupiers of certain lands within the hamlet or village of *Caldwall*, in the pariſh of *Stapenhill*, in their ſaid anſwer ſpecified and mentioned, but inſiſted that the plaintiff was not intitled to any tithes in kind of any titheable matters ariſing within the ſaid village or hamlet of *Caldwall*, either from the ſaid defendants or any other perſon whomſoever, owners or occupiers of any lands, tenements, or hereditaments, or any payment in lieu or reſpect thereof, other than and except that from time immemorial there had been paid by the inhabitants, proprietors, and owners of lands and tenements within the ſaid village, townſhip, or hamlet of *Caldwall*, to the plaintiff and his predeceſſors, vicars of the ſaid pariſh for the time being, the ſum of ſix pounds on the feaſt of St. *John* the Baptiſt, in every year,

year, for, and as a *modus*, and in full payment and ſatisfaction for, and in lieu of all tithes, rights, compoſitions, obventions and emoluments whatſoever due or payable to the vicar, for the time being, of the ſaid pariſh of *Stapenhill*, from the inhabitants, proprietors, and occupiers of lands and tenements within the ſaid village or hamlet of *Caldwall*, in reſpect of ſuch lands and tenements, and the defendants contended that ſuch a *modus* or ancient payment of ſix pounds had been confirmed by immemorial cuſtom, as well as by a certain indenture, bearing date 22d *September* 1676, in the words following, that is to ſay,

" *Hæc Indentura facta inter* Willielmum *dominum* Paget, *Baronem de* Beandeſert, *verum et indubitatum patronum vicariæ perpetuæ eccleſiæ parochialis de* Stapenhill, *in comitatu* Derbiæ, Litchfeldiæ *et* Coventriæ *dioceſiâ, et* Johannem Lucas, *artium magiſtrum, vicarium perpetuum ejuſdem vicariæ perpetuæ eccleſiæ parochialis de* Stapenhill *antedictâ, ex conſenſu et aſſenſu reverendi in Chriſto patris et domini, domini* Thomæ, *providentiâ divinâ,* Litchfeldiæ *et* Coventriæ *epiſcopi, ex unâ parte*; Samuelem Sanders *de* Caldwall, *in comitatu et dioceſiâ prædictis, armigerum,* Edwardum Holland, *de iiſdem, generoſum,* Elizabetham Aſton, *viduam,* Thomam Webſter, Thomam Callingwood, Willielmum Cox, Georgium Thrumpton, *de iiſdem,* yeomen, Thomam Baxter, Ricardum Capenhurſt, Thomam Baker, *de iiſdem,* huſbandmen, Thomam Jackſon, *de iiſdem,* carpenter, Thomam Corbitt *de iiſdem,* blackſmith, *alioſque omnes incolas dictæ villæ de* Caldwall *prædictâ,* Ricardum Bath *de* Linton, *in comitatu* Derbiæ *prædicto, et* Robertum Nicklinſon, *de* Swadlincote, *in comitatu et dioceſiâ prædictis,* huſbandmen, *et* Willielmum Lowe, *de* Burton *ſuper* Trent, *in comitatu*

comitatu Staffordiæ, *et dioceſiâ prædictâ*, ſhoemaker, *proprietaries et occupatores quarundem terrarum, infra eandem villam de* Caldwall *prædictâ jacentium, ex conſimili conſenſu et aſſenſu reverendi in Chriſto patris et domini, domini* Thomæ *providentiâ divinâ* Litchfeldiæ *et* Coventriæ *epiſcopi, ex alterâ parte*; TESTATUR * quod tam pro bono capellæ de CALDWALL, *infra villam de* Caldwall *prædictam, et inhabitantium villæ prædictæ*, quam pro bono eccleſiæ parochialis de STAPENHILL *prædictâ, de quâ quidem eccleſiâ de* Stapenhill *prædictâ, capella de* Caldwall *prædictâ, membrum eſt*; ac etiam pro, et in conſideratione ac quietantiæ, et finalis concordantiæ, omnium differentioſum et controverſioſum, omnes et ſingulas decimas, *oblationes, obventiones*, compoſitiones, *aliaque jura, et emolumenta eccleſiaſtica quæcunque, vicaria perpetuo perpetuæ eccleſiæ parochialis de* Stapenhill *prædictâ, per inhabitantes, poſſeſſores, et occupatores terrarum, infra villam de* Caldwall *prædictâ jacentium, debitas et ſolutas agreatum, concordatum, et concluſum eſt, et per præſentes inter partes prædictas, ex conſenſu et aſſenſu antedicti reverendi in Chriſto patris, concordatum eſt et concluſum quod præfatus* Johannes Lucas, *vicarius perpetuus vicariæ perpetuæ eccleſiæ parochialis de* Stapenhill *prædictâ, ejuſque ſucceſſores vicarii perpetui ejuſdem vicariæ perpetuæ, ſemel in quâlibet menſe, annuatim, in quolibet anno* imperpertuum *divinas preces in capellâ de* Caldwall *prædictâ, ſecundum formam libri communium precum, leget, et poſt lectionem earundem, juxta morem eccleſiæ* Anglicanæ, *conçionabitur*; *præfatique incolæ de* Caldwall *prædictâ, ac proprietarii et occupatores terrarum infra eandem villam jacentium, omnes et ſinguli, et eorum hæredes, exe-*

* What is here printed in *Roman* (except names and dates) is not ſo printed in the copy of this inſtrument ſet out by the plaintiff in his bill, but only in that copy which the defendant hath ſet forth in his anſwer.

cutores,

cutores, adminiſtratores, ſive ſucceſſores, eidem Johanni Lucas, *et ſucceſſoribus ſuis, vicariis perpetuis ejuſdem vicariæ perpetuæ eccleſiæ parochialis de* Stapenhill *prædictâ, ſummam* ſex librarum, *legalis monetæ* Angliæ, *in plenam contentationem, ſatisfactionem, et exonerationem omnium et omnimodum decimarum, jurium,* compoſitionum, *obventionum, oblationum, juriumque, et emolumentorum eccleſiaſticorum quorumcunque, infra eandem villam de* Caldwall *prædictâ, qualitercunque, creſcentium, provenientium, renovantium, aut aliquo modo contingentium, eidem vicario perpetuo, et quovis modo debitorum, aut ſolvi conſuetorum, ad feſtum ſancti* Johannis *Baptiſtæ, annuatim, in quolibet anno* imperpetuum *ſolvent; idemque* Johannes Lucas *vicarius perpetuus antedictus, ejuſque ſucceſſores, vicarii perpetui vicariæ perpetuæ eccleſiæ parochialis de* Stapenhill *prædictæ, eandem ſummam* ſex librarum, *in plenam contentationem, ſatisfactionem, ſolutionem, et exonerationem omnium et ſingularium decimarum, jurium,* compoſitionum, *obventionum, oblationum, et emolumentorum eccleſiaſticorum quorumcunque prædictorum; et ut præfertur quovis modo debitorum aut ſolvi conſuetorum* imperpetuum *ad feſtum prædictum accipient et recipient,* IN CUJUS *rei teſtimonium partes ad preſentes ſigilla ſua iiſdem mutuo apposuerunt* viceſimo ſecundo *die menſis* Septembris, *anno regni domini noſtri Caroli Secundi, Dei gratiâ,* Angliæ, Scotiæ, Franciæ, *et* Hiberniæ, *regis, fidei defenſoris &c. viceſimo octavo, annoque Domini* 1676. *Et nos epiſcopus antedictus in fidem et teſtimonium præmiſſorum ſigillum noſtrum epiſcopale preſentibus apposuimus.* Will. ⋈ Pagett, John ⋈ Lucas, Tho. ⋈ Litch, *et* Coventr.

" This indenture made between *William* Lord *Paget,* Baron of *Beandeſert,* the trüe and undoubted patron of the perpetual vicarage of the pariſh church of *Stapenhill* in the county of *Derby,* within the dioceſe of *Litchfield* and *Coventry,* and *John Lucas,* Maſter of Arts,

Arts, perpetual vicar of the ſame perpetual vicarage, of the pariſh church of *Stapenhill* aforeſaid, with the conſent and aſſent of the reverend father and lord in Chriſt, *Thomas* by divine providence Lord Biſhop of *Litchfield* and *Coventry*, of the one part; *Samuel Saunders*, of *Caldwall*, in the county and dioceſe aforeſaid, Eſq; *Edward Holland*, of the ſame, gentleman, *Elizabeth Aſton*, widow, *Thomas Webſter*, *Thomas Collingwood*, *William Cox*, *George Thrumpton*, of the ſame, yeomen, *Thomas Baxter*, *Richard Capenhurſt*, *Thomas Baker*, of the ſame, huſbandmen, *Thomas Jackſon*, of the ſame, carpenter, *Thomas Corbitt*, of the ſame, blackſmith, and all and ſingular others, inhabitants of the ſaid town of *Caldwall* aforeſaid, *Richard Bate* of *Linton*, in the aforeſaid county of *Derby*, and *Robert Nicklinſon*, of *Swadlincote*, in the county and dioceſe aforeſaid, huſbandmen, and *William Lowe* of *Burton* upon *Trent*, in the county of *Stafford*, and dioceſe aforeſaid, ſhoemaker, proprietors and occupiers of certain lands, lying within the ſame town of *Caldwall* aforeſaid, with the like conſent and aſſent of the reverend father and lord in Chriſt, *Thomas* by divine providence, Lord Biſhop of *Litchfield* and *Coventry*, of the other part, TESTIFIES, *that as well for the good of the Chapel* of CALDWALL, within the town of *Caldwall* aforeſaid, and of the inhabitants of the aforeſaid town, *as for the good of the pariſh church of* STAPENHILL aforeſaid, of which church of *Stapenhill* aforeſaid, the chapel of *Caldwall* aforeſaid is a member; *and alſo for and in conſideration of an acquittance and final agreement of all differences and controverſies, of and concerning all and ſingular tithes*, oblations, obventions, *compoſitions*, and other eccleſiaſtical rights and emoluments whatſoever, to the perpetual vicar of the perpetual vicarage of the pariſh church of *Stapenhill* aforeſaid, due from, and payable

payable by the inhabitants, poſſeſſors, and occupiers of lands, lying within the town of *Caldwall* aforeſaid, it is agreed, accorded, and concluded, and by theſe preſents, between the parties aforeſaid, and with the conſent and aſſent of the aforeſaid reverend father in Chriſt, it is accorded and concluded, that the aforementioned *John Lucas*, the vicar perpetual, of the perpetual vicarage, of the pariſh church of *Stapenhill* aforeſaid, and his ſucceſſors, the perpetual vicars of the ſame perpetual vicarage, once in every month, annually, in every year, *for ever* ſhall read divine ſervice in the chapel of *Caldwall* aforeſaid, in the form of the book of common prayers, and after reading the ſame, according to the cuſtom of the church of *England*, ſhall preach a ſermon; and the aforementioned inhabitants of *Caldwall* aforeſaid, and the owners and occupiers of lands, lying within the ſame town, and all and every their heirs, executors, adminiſtrators, or their ſucceſſors, to the ſame *John Lucas* and his ſucceſſors, the perpetual vicars, of the ſame perpetual vicarage, of the pariſh church of *Stapenhill* aforeſaid, ſhall *for ever* pay the ſum of *ſix pounds* of lawful money of *England* in full content, ſatisfaction, and diſcharge of all and all manner of tithes, rights, *compoſitions*, obventions, oblations, eccleſiaſtical rights and emoluments whatſoever, within the ſame town of *Caldwall* aforeſaid, however ariſing, proceeding, renewing, or otherwiſe accruing, to the ſame perpetual vicar, or in what manner or by what cuſtom due or payable; at the feaſt of St. *John* the Baptiſt, annually, in every year. And the ſame *John Lucas*, the perpetual vicar aforeſaid, and his ſucceſſors, the perpetual vicars, of the perpetual vicarage, of the pariſh church of *Stapenhill* aforeſaid, ſhall *for ever* accept and take the ſaid ſum of *ſix pounds* in full content, ſatisfaction, payment, and diſcharge,

of

of all and ſingular tithes, rights, *compoſitions*, obventions, oblations and the ſaid eccleſiaſtical emoluments whatſoever, and as mentioned before, in whatever manner they did become due, or were uſed to be paid, on the aforeſaid feaſt day. In witneſs whereof, the parties to theſe preſents have mutually affixed their ſeals thereto, 22d *September*, in the twenty-eighth year of the reign of our Lord *Charles* the *Second*, by the Grace of God, of *England*, *Scotland*, *France*, and *Ireland*, King, defender of the faith, &c. and in the year of our Lord 1676. And * *we* the aforeſaid biſhop, in faith and teſtimony of the premiſes, have affixed *our* epiſcopal ſeal to theſe preſents."

"*Will.* † (L. S.) *Paget*, *John* (L. S.) *Lucas*, *Tho.* (L. S.) *Litchfield* and *Coventry*."

The cauſe being at iſſue, ſeveral witneſſes were examined on both ſides.

On the part of the plaintiff it was proved, that the ſaid village or hamlet of *Caldwall* is part of the pariſh of *Stapenhill*, and that the inhabitants of *Caldwall* contributed to the repair of *Stapenhill* church.

It was alſo proved, that the vicar of *Stapenhill* for the time being, had, as far back as the memory of witneſſes went, collected and received tithes in kind for all hay, clover, lamb, wool, fruits, eggs, and piggs, and other ſmall tithes ariſing within the other parts of the ſaid pariſh, not parcel of the village of *Caldwall*.

* It ſeems obſervable that the biſhop ſpeaks in the *royal* ſtyle of the *plural* number. *J. R.*

† A peer *generally* ſigns by his *titular name only*. *J. R.*

On

On the part of the defendants it was proved, that *Caldwall* was a chapelry, in which there was a chapel of ſome antiquity, repaired by the inhabitants of the hamlet of *Caldwall.*

It was alſo proved, that the ſum of ſix pounds had been raiſed by a levy according to the pound rate, and paid for many years to the vicar of *Stapenhill* for the time being, and they alſo proved that tithes in kind of the ſeveral articles claimed by the bill, had not, during the memory of living witneſſes, been paid to the vicar of *Stapenhill.*

The ſaid cauſe came on to be heard, before the barons of the court of *Exchequer*, on 11th *December* 1775, on the hearing of which cauſe, there were produced and read, on the part and behalf of the plaintiff, the indenture dated 22d *September*, 1676, in the defendant's anſwer mentioned.

An exhibit marked (*C.*) being a terrier, dated 23d *June* 1665, ſigned *John Lucas*, and others, wherein is the following entry, *viz.*

Item, pigs, geeſe, wool, and lamb are paid in the pariſh of *Stapenhill*, and town of *Caldwall*, according to the antient law, *fœtus ab lactatu debet eſſe, antequam præſtetur*, (to wit) when they are weanable, or of ſtrength to live without the dam."

" *Item*, hay, hemp, flax, calves, colts, all manner of fruit and *Eaſter* offerings, are paid in the pariſh, and from all the town of *Caldwall*, without exception, for this vicarage anciently was endowed, *omnibus minutis decimis.*"

An exhibit marked (*A.*) being a terrier dated 29th *September*, 1719, wherein is the following entry:

" All manner of tithes (excepting corn only) as pigs, geeſe, wool, lamb, calves, colts, eggs, hay, hemp, flax, and all manner of fruit and *Eaſter* offerings, have formerly been paid in kind to the vicar of *Stapenhill*, by the inhabitants of *Caldwall*; but by an agreement made between the vicar and the ſaid inhabitants bearing date 22d *September*, 1676, by the conſent of the patron and lord biſhop, *declared by their being* * *parties to the ſame*, the ſaid inhabitants pay in lieu of all tithes and profits due from thence to the vicar, the ſum of ſix pounds yearly, on St. *Baptiſt*'s day, which the chapel warden gathers and pays the day it becomes due".

An exhibit marked (*B.*) being a terrier, dated 12th *July* 1726; an exhibit marked (*D.*) being a terrier, dated 30th *October* 1701; and an exhibit marked (*E*) being a terrier, dated 2d *February*, 1705; and on behalf of the defendants there was produced and read a terrier dated 23d *June* 1682, wherein is contained the following entry, *viz.*

" *Item*, pigs, geeſe, wool, and lambs are paid in the pariſh of *Stapenhill*, excepting *Caldwall*, according to the ancient law, *fœtus ab lactatu debet eſſe ante quam præſtetur*, (to wit) when they are weanable, or of ſtrength to live without the dam."

" *Item*, ſix pounds of monies paid from the town of *Caldwall*, hay, hemp, flax, calves, colts, all

* Being parties *only*, does not bind them, unleſs they alſo executed the deed. *J. R.*

manner

manner of fruit, and *Eaſter* offerings, are paid in the pariſh, excepting *Caldwall*, for this vicarage anciently was endowed, *omnibus minutis decimis.*"

On reading this written evidence, and the depoſitions, the court of *Exchequer* ordered and decreed, that it be referred to the deputy remembrancer of the ſaid court to take an account of what was due to the plaintiff from the defendants reſpectively, for the value of the tithes demanded by the bill; and that the ſaid defendants ſhould pay to the plaintiff what upon ſuch account ſhould be found due to him, for the value of the ſaid reſpective tithes.

*** *The caſe of the defendants, as ſtated by them, in the printed appeals preſented to the Lords, counſel, and parties concerned, previous to the hearing, with the manuſcript judgments of the Houſe indorſed thereon.*

The rectory of the pariſh of *Stapenhill*, in the county of *Derby*, with the two chapelries of *Caldwall* and *Newhall*, was formerly an appropriation belonging to the neighbouring monaſtery of *Burton upon Trent*.

After the diſſolution of the greater monaſteries the rectory impropriate with the great tithes of the ſaid pariſh and chapelries, and the advowſon of the vicarage with thoſe chapelries annexed, and the manor of *Caldwall* and other large eſtates were granted to an anceſtor of the preſent Lord *Paget*, in whoſe family the advowſon has ever ſince remained, but the manor and great tithes of *Caldwall* were long ſince conveyed to an anceſtor of the defendant Mr. *Mortimer*.

The vicarage conſiſts of the townſhip of *Stapenhill*, which is extenſive, and the vicar from that town-

ſhip has uſually received tithe hay and all ſmall tithes, or ſome compoſition in lieu thereof, but from the chapelry of *Caldwall*, which conſiſts of the village or hamlet of *Caldwall*, or from the chapelry of *Newhall*, which conſiſts of the joint hamlets of *Newhall* and *Stanton Ward*, there never has, in any inſtance within memory, been paid any tithe *in kind* whatever; on the contrary the defendants inſiſt there has been immemorially paid to the vicar, by the inhabitants and occupiers of lands and tenements in *Caldwall*, in lieu of all vicarial tithes, the yearly ſum of ſix pounds payable on *Midſummer day*, which ſum has been uſually raiſed according to a pound rate, levied and aſſeſſed within the chapelry of *Caldwall*, by a levy called *the parſon's levy*, and in proportion to the rents and value of lands in the chapelry of *Caldwall*, and a ſum of ſix pounds three ſhillings has, in like manner, been annually paid to the vicar, by the inhabitants and occupiers of lands and tenements, within the chapelries of *Newhall* and *Stanton Ward*.

The townſhip of *Stapenhill* and the two chapelries have always been conſidered as three diſtinct diſtricts; the inhabitants of each maintain their own poor only, and chuſe their own chapel wardens, overſeers of the poor, and conſtables.

There are no remains of any chapel in the hamlet of *Newhall* and *Stanton Ward*; but in *Caldwall* there is a very ancient chapel, where the vicar of *Stapenhill* has, at ſtated times, always officiated; and the inhabitants of *Caldwall* have always repaired this chapel, except the chancel, which has been repaired by the defendant Mr. *Mortimer* only, and by his anceſtors; and the inhabitants of *Caldwall* only have ſeats in the chapel.

The

The pariſh of *Caldwall* is of the yearly value of about eight hundred pounds; it contains nine hundred and fifty acres of land, whereof ſix hundred and ſeventy are the freehold and inheritance of the defendant Mr. *Mortimer*, and one hundred acres are the inheritance of *Joſeph Fowler*, clerk, (whoſe tenant is the defendant Mr. *Kirkman*) and the reſt belonging to other perſons.

The chapelry or hamlets of *Newhall* and *Stanton Ward* are rather more extenſive than *Caldwall*, but nearly of equal value.

In the reign of his Majeſty king *Charles* the *ſecond*, ſome diſputes having ariſing between the then vicar of *Staphenhill*, and *Samuel Sanders* of *Caldwall* Eſqr; (Mr. *Mortimer's* anceſtor) and the other inhabitants of *Caldwall*, concerning the divine ſervice uſed at and neceſſary to be performed at that chapel, and the vicar having, on that occaſion, ſet up ſome claim of tithes, or ſome compoſition in lieu, to which he was not intitled; therefore, and to prevent diſputes and diſſentions for the future, and to perpetuate the memory, as well of the *modus* or ſtipend the vicar for the time being was intitled to, as of the duty to be performed by him, an indenture, framed under the ſanction and authority, and under the ſeal of Lord *Paget*, then the patron of the vicarage, and of the Biſhop of *Litchfield* and *Coventry*, the dioceſan and ordinary, was made and executed in the following * words:

* As this indenture, with a tranſlation, is copied under the plaintiff's caſe in this cauſe, it was not thought neceſſary to repeat it here, eſpecially as it is *verbatim* the ſame, except that the copy ſet out by the defendant, in his anſwer, has no pointing or ſtops.

The ſeveral vicars for the time being, and the inhabitants of *Caldwall*, ever ſince the execution of this deed, have been ſo well ſatisfied of the juſtice of it, that it has in no inſtance been departed from, either in reſpect of the *modus* or ſtipend, or of the vicar's duty till *Midſummer* 1773; previous to which time the plaintiff Mr. *Lloyd*, who had then been vicar of *Stapenhill* four or five years, gave notice to the inhabitants of *Caldwall*, that he would no longer accept of the yearly ſum of ſix pounds, but ſhould inſiſt on the payment of tithe hay, and all ſmall tithes in kind; with which demand the defendants having refuſed to comply, therefore,

The plaintiff Mr. *Lloyd* filed his bill in the court of *Exchequer*, in *Michaelmas* term, 1773, againſt the defendants, thereby ſetting forth, that the vicars of *Stapenhill*, during his incumbency and long before, were intitled by endowment, or preſcription, to all tithes of hay and graſs, and clover cut for hay, and all ſmall tithes ariſing within the pariſh of *Stapenhill*, and titheable places thereof, and particularly, within the village, townſhip, or hamlet of *Caldwall*, lying within and parcel of the ſaid pariſh; and charging that the defendants had occupied divers lands and tenements in *Caldwall*, from which hay and clover, and other things titheable to the vicar, had been produced, the tithes whereof the defendant had refuſed to make any ſatisfaction for, and ſtating the notice by him the ſaid plaintiff given, by which he had refuſed to accept of the ſaid annual ſum of ſix pounds, as a compoſition from the inhabitants of *Caldwall*, and the bill prayed an accompt and payment of the tithes due from the defendants.

To this bill the defendants put in their anſwer in *Trinity* term 1774, and thereby inſiſted, that there had

had been immemorially paid by the inhabitants, proprietors, and occupiers of lands and tenements, within the village, townſhip or hamlet of *Caldwall*, to the plaintiff and the vicars of *Stapenhill* for the time being, the ſum of ſix pounds on the feaſt day of Saint *John* the Baptiſt in every year, for and as a *modus*, and in full payment and ſatisfaction for, and in lieu of all tithes, rights, compoſitions, obventions, and emoluments whatſoever, due or payable to the ſaid vicar, from the inhabitants, proprietors, and occupiers of lands and tenements in *Caldwall*, in reſpect of ſuch lands and tenements; and that the ſaid yearly ſum of ſix pounds had been immemorially paid by a pound rate, in manner before mentioned; and that there had been immemorially a church or chapel at *Caldwall*, peculiarly appropriated to the inhabitants of *Caldwall*, where the vicar of *Stapenhill* had immemorially officiated; and they inſiſted that the ſaid indenture, dated 22 *September*, 1676, which they ſet forth *verbatim*, was made to prevent ſuits and diſſentions, and to perpetuate the memory as well of the divine ſervice then performed, and of right to be performed, by the vicar of the ſaid chapel, as of the *modus* or ſtipend uſually paid, and of right due, and that the *modus* or ancient payment of ſix pounds having been confirmed by immemorial cuſtom, as well as by the conſent of parties, and the ſanction and authority of the patron and ordinary, the ſame ought not to be ſet aſide or avoided; and they contended, that the ancient payment of ſix pounds three ſhillings by the inhabitants of the chapelry of *Newhall*, and *Stanton Ward*, being in all reſpects ſo ſimilar, was a further confirmation of the antiquity of the payment, for *Caldwall*, and the defendant Mr. *Mortimer* admitted, he occupied one hundred acres of his own freehold lands in *Caldwall*, whereof fifty acres were in tillage,

twenty mowed. and forty in paſture; and the defendant *Kirkman* admitted he occupied all Mr. *Fowler*'s lands in *Caldwall*, whereof thirty *acres* were in tillage, twenty mowed, and fifty fed; but as no tithe in kind had, within the memory of man, been had or taken by the vicar of *Stapenhill*, nor any payment or compoſition for the ſame, except as aforeſaid, they inſiſted they were not liable to accompt for the value of the tithes.

The plaintiff having replied to this anſwer, divers witneſſes were examined, and the plaintiff proved, that the tithe of hay, and other ſmall or vicarial tithes in *Caldwall*, if gathered in kind, were worth ſeventy-ſeven pounds a year, but the plaintiff did not prove any endowment, or any inſtance, that tithe of any kind had ever been received by any vicar of *Stapenhill*, from any inhabitant or occupier of land in *Caldwall*.

On the contrary, the defendants proved, by many witneſſes, that the ſum of ſix pounds had been, beyond time of memory, paid in manner before ſtated; and ſeveral ancient perſons proved the ſame from the declarations of other ancient perſons, who had been long dead, and particularly *Thomas Harvey* depoſed, that he had frequently heard his father declare, (who died thirty-five years before, at the age of threeſcore and ten,) that ſix pounds were, all his time and long before, paid to the vicar by the inhabitants of *Caldwall*; and the defendants proved the other facts ſet forth in the anſwer.

On the hearing of this cauſe before the barons of his Majeſty's court of *Exchequer*, on 4 *December*, 1775, their honours were pleaſed to order and decree, that

that it ſhould be referred to the deputy remembrancer of the ſaid court, to take an account of what was due to the plaintiff from the defendants reſpectively, for the value of the tithes demanded by the bill, with other uſual directions; and it was further ordered, that the defendants ſhould pay to the plaintiff, what ſhould be found due from them reſpectively by the deputy remembrancer, for the value of their ſaid reſpective tithes, but without coſts to that time.

At the hearing, the plaintiff produced, and the court of *Exchequer* was pleaſed to admit, as evidence, a terrier dated 23 *June*, 1765, appearing to be ſigned by the vicar and churchwardens, but not ſigned by the ſaid *Samuel Sanders*, as any other inhabitants of *Caldwall*, to which the defendant's counſel objected, but the objection was overruled.

See this cauſe on appeal, under *Hilary* Term, 17 *Geo.* III.

December 18, A. D. 1775.

In the *Exchequer*.

George Travis, clerk, vicar of the parish church of *Eastham*, in the county of *Chester*, } Plaintiff.

William Whitehead, who was, in the year 1771, owner and occupier of *three* tenements, within the townſhip of *Little Sutton*, in the ſaid pariſh of *Eaſtham*, and occupier only of *two* other tenements there, under *Thomas Whittle*, gentleman, the owner thereof; *all* which in 1771, and the *three* firſt for many years preceding, had been occupied as *one* farm, or tenement, within the ſaid pariſh: *Ralph Davis*, occupier only, in 1771, under *George Bundel*, and *George Robins*, gentlemen, of four tenements in the townſhip of *Great Sutton*; all which were in 1771, and for ſeveral years preceding had been occupied as *one* farm, or tenement within the ſame pariſh: *Elizabeth Bateman*, } Defendants.

occupier

occupier only, in the ſaid year 1771, under *Thomas Cholmondeley* Eſq; of certain lands incloſed in 1735, from the waſte or commonable lands, within the townſhip of *Great Sutton* aforeſaid, called *Motherleſs Heath*: *Thomas Maddock*, occupier of *nine* tenements, or parts of tenements, in the townſhip of *Whiteby*: and *John Oxton* and *John Healing*, occupiers in ſeveralty, of the townſhip, or demeſne of *Netherpoole*, within the ſaid pariſh of *Eaſtham*, } Defendants.

*** *The caſe of the plaintiff, as ſtated in his appeal, delivered to the Lords, counſel, and parties concerned, previous to the hearing, with the manuſcript judgment of the Houſe indorſed thereon.*

THE plaintiff was inducted into the vicarage of the pariſh of *Eaſtham*, in *March* 1766, (where he has ever ſince reſided), on the preſentation of his preſent Majeſty; the right to preſent thereto, for that turn, being veſted in the crown by lapſe. In *Auguſt* 1767, he was again preſented to the ſame vicarage by the dean and chapter of *Cheſter*, the patrons thereof, his former preſentation having become void by his acceptance of a ſmall curacy adjacent to the pariſh of *Eaſtham*. Plaintiff's preſentations.

The immediate predeceſſor of the plaintiff died inſolvent; and the incumbent who preceded *him* lived, as

as it were, upon charity. The income of this vicarage, when the plaintiff ſucceeded to it, (although the pariſh is opulent and extenſive) did not amount to thirty-five pounds *per ann.*

Bill filed in *Hilary* Term, 1772.

After ſeveral ineffectual attempts to recover, by reference and arbitration, what he conceived to be the rights of this vicarage, the plaintiff at length exhibited a bill of complaint, in *Hilary* Term 1772, in the court of *Exchequer* at *Weſtminſter*, againſt the defendants; his bill ſtated, "That the ſaid vicarage was, and from the time whereof the memory of man was not to the contrary had been, endowed with the tithe of all and all manner of hay, hay-graſs, agiſtment tithe, and all other ſmall tithes ariſing within the ſaid pariſh;" and it was brought againſt *all* the defendants for an account of the *tithe of hay in kind, for* the year 1771, and againſt *two* of them, *John Oxton* and *John Healing*, for an account of *ſmall tithes* alſo in that year.

Tithe of hay only demanded from the preſent defendant by the plaintiff's bill.

The defendants, after having delayed the plaintiff with an inſufficient anſwer, to which exceptions were taken, anſwered more particularly in *Trinity* Term 1773. The parties went to commiſſion in 1774, which ſat upwards of forty days; in the courſe of which time the plaintiff was obliged to prove his preſentation, inſtitution, and induction; theſe matters being refuſed to be admitted by the ſolicitor for the defendants, although he had then been incumbent of the pariſh upwards of eight years.

It appeared, by admiſſion in the anſwers, and by proof in the cauſe, that the pariſh of *Eaſtham* contains eight townſhips, *viz.*

1. *Eaſtham*

1. *Eaſtham cum Plymyard & Carlet.*
2. *Hooton* (of which the demeſne lands are about one half).
3. *Childer-Thornton.*
4. *Over-Poole.*
5. *Nether-Poole* (the demeſne lands of which, and the townſhip, are commenſurate).
6. *Little Sutton* (of which the demeſne lands are about one third part).
7. *Great Sutton.*
8. *Whitby* (part only of which townſhip is ſituate within the pariſh of *Eaſtham*, the reſt lying within the adjacent pariſh of *Stoke*).

The townſhips in ſuit by the plaintiff's bill above ſtated, except the demeſne of *Little Sutton.*

The rectory of this pariſh, together with the whole of the townſhips of *Eaſtham*, *Over-Poole*, *Little Sutton*, *Great Sutton*, and *Whitby*, were anciently part of the poſſeſſions of the abbey of St. *Werburgh*, in *Cheſter*, one of the greater abbeys of the *Benedictine* order; and became veſted in the crown upon the diſſolution of that religious houſe. St. *Werburgh.*

The inſtrument of endowment of this vicarage (granted, it is preſumed, by the abbey) is now loſt. But it was proved by the plaintiff, or otherwiſe admitted in the anſwers, that the tithe of *hay in kind* had been immemorially yielded to the vicar throughout *three* townſhips, *Eaſtham*, *Childerton*, and *Overpoole*; and in part of *two* other townſhips, *viz.* throughout the townſhip of *Hooton*, except the demeſne lands, and in *Whitby*, for lands lying in the pariſh of *Eaſtham*, and belonging to houſes ſituate within the pariſh of *Stoke*: and further, that a com- *Thomas Mercer*, *John Croſe*, *Ann Croſe*, *Thomas Edwards*, *Richard Walton*, *Joſeph Critchley*, *William Edwards*, *Thomas Williams*, *Richard Kendrick.* Appendix, No. I.

compoſition, which all the plaintiff's witneſſes agreed had been conſtantly underſtood in the pariſh to be payable in lieu (*inter alia*) of tithe *hay*, had been received by the vicar in the remaining parts of the pariſh (except thoſe which were the objects of the ſuit); namely, from the reſpective halls and demeſnes of *Hooton*, and *Little Sutton*. And, as to *ſmall tithes*, it was on all ſides agreed, that they were due to the vicar in kind, or *ſub modo*, throughout the pariſh.

It appeared alſo clearly in proof, that the impropriators had never *collected*, or taken, in any part of the pariſh, any tithes, either in kind, or otherwiſe, ſave thoſe of *corn* and *grain* only; although ſuch of them, as were owners of the ſeveral demeſnes before mentioned, and their tenants, had *retained* the tithe of hay, and the ſmall tithes, ariſing thereon: which retainer, however, was accounted for by the general *moduſes*, or compoſitions, paid to the vicar from thoſe demeſnes.

Thus ſtood the *general*, *primâ facie*, title of the plaintiff to recover, evidenced on the ground of preſcription, which infers an original endowment.

As to the defendant *William Whitehead*.

The defence, which *William Whitehead* ſet up, is reducible to the two following points:

1. That the tithe of hay, ariſing within the townſhip of *Little* (as alſo of *Great*) *Sutton*, was granted by Queen *Elizabeth*, in the 22d year of her reign, as part of the rectory of the pariſh, to *Hugh Cholmondeley*. (Second anſwer, fol. 16.)

2. That the purchaſers of tenements in *Little Sutton*, in 1733, from *Charles Cholmondeley*, Eſq; (deſcendant of ſaid *Hugh*) and particularly this defendant, and *Thomas Whittle*, purchaſers

chaſers of the five tenements occupied by this defendant in 1771, did, at the ſame time, purchaſe the *tithe of hay* ariſing thereon. Second anſwer, fol. 36 to 43.

The grant, here inſiſted on, is (ſo far as ſeems material) in theſe words:

Grant, 22 *Eliz.* to *Hugh Cholmondeley* and others.

* " Damus ac concedimus p'fat' *Hugoni Chol-*
" *mondeley*, &c. omnia & ſingula man'ia
" d'nia, meſſuagia, &c. glebas *decimas ob-*
" *laco'es*, &c. NOSTRA quæcunq; ſi-
" tuat' in villis campis p'ochiis ſeu hamlet-
" tis de *Sutton* in *Wirehall Eſtham Plymyard*
" *Childer-Thornton Over-Poole Nether-Poole*
" *Sutton Magna Sutton P'va Whitby*, &c. in
" dicto com' *Ceſtr' dictis rectoriis* vel earum
" alicui *ſpectan' vel p'tinen'* quæ ut *pars* vel
" poſſeſſion' monaſter' ſ'c'æ *Wereburgæ Ceſtr'*
" nuper diſſolut' fuerunt aut extiterunt" &c.

" Except' tamen advocationibus & jur' patro-
" natus vicariar' noſtrar' de *Eaſtham* &c.
" cum o'lbus terris glebalibus *decimis* obla-
" co'b's p'ficuis & aliis hæredit' quibuſcunq;
" eiſd' vicariis ſeu eorum alicui aliquo modo
" ſpectan' ſive p'tinen'" &c.

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* *i. e.* We give and grant to the before-named *Hugh Cholmondeley*, &c. all and ſingular OUR manors, domains, meſſuages, &c. glebe, *tithes*, *oblations*, &c. whatſoever, ſituate in the towns, fields, pariſhes, or hamlets of *Sutton* in *Wirehall*, *Eſtham*, *Plymyard*, *Childer Thornton*, *Over-Poole*, *Nether-Poole*, *Great Sutton*, *Little Sutton*, *Whitby*, &c. to the ſaid rectories, or to either of them belonging, or appertaining, in the ſaid county of *Cheſter*, which were deemed part or parcel of the poſſeſſions of the monaſtery of St. *Werburgh*, at *Cheſter*, lately diſſolved.

Except, however, the advowſons and rights of patronage of our vicarages of *Eaſtham*, &c. together with all glebe lands, *tithes*, oblations, profits, and other hereditaments whatſoever, to the ſaid vicars, or to any of them, in any manner belonging or appertaining, &c. *J. R.*

" Except'

The words of this grant, being general only, did not, it was contended, prove the firſt points inſiſted on by this defendant; nor was his aſſertion true; the tithe of *hay* in *Little Sutton never did compoſe* any part of the rectory there; as appeared from the following evidence.

Rental of the abbey of St. *Werburgh*, 10 *Hen.* VI. A. D. 1432. Exhibit 36.

I. The rental of the poſſeſſions of the abbey of St. *Werburgh*, taken 10 *Hen.* VI. It is long and particular. It mentions the abbot's tenants by name, gives the lands, held by each, to the fourth part of an acre, and the *rent* paid by each to a ſingle *obolus*. And in this rental the *decima garbæ* is the only tithe claimed by the abbot, as his property, within the pariſh of *Eaſtham*; although in other pariſhes, where he poſſeſſed other tithes, they are particularly recorded therein, even to the *altare gium*. The words of this rental, reſpecting the townſhips of *Great* and *Little Sutton*, (after a minute detail of the particulars juſt mentioned) are as follow.

"* Et ſciend' eſt q'd tenent' de *Magna Sutton* " & *P'va Sutton*, dabunt d'ino ad ejus vo- " luntat' pro qualibet bovat' tre dim' " quart' aven' pro *rent otes*, et pdci' tenent' " & tenent' de *Whitby* & *Overpull* caria- " bunt *decim' garb'* de eiſd' villis uſque " man'iu'

* "And it is to be known, that the tenement of *Great* and *Little Sutton* ſhall give to the lord, at his will, for every oxgang of land half a quarter of oats for rent otes; and for the aforeſaid tenement, and the tenement of *Whitby* and *Overpool*, ſhall carry *tithes of grain* from the ſaid villages to the manor of *Sutton*, at their own expence; and ſhall carry fire-wood, and give, for every oxgang, one cock and ten eggs, &c." *J. R.*

" man'iu' de *Sutton*, ſuis p'priis expenſis " et caſiab' lignu' focal' & dabunt pro " qualibet bovat' una' gallina' & X " ova" *&c.*

II. *Thomas Walker* proved, that he and his late father, ſucceſſively leſſees of the impropriate rectory in *Little Sutton*, never received, and that he, as leſſee of the ſame, does not now receive, any other tithes than *corn and grain*, within the ſaid townſhip. *Thomas Walker*, Int. 14, (Appendix, No. 1.)

III. The depoſitions of all the plaintiff's witneſſes uniformly proved, without any contradiction from thoſe of the defendants, that the impropriate rectors had never received, in any part of the pariſh, any tithe ſave that of *corn only*.

The former part of this defence being thus negatived, the latter part (*viz. the defendant's pretence of purchaſe of the tithe of hay from Charles Cholmondeley*,) it was urged, fell with it. If the rectory did not contain, the rector could not ſell, the tithe of hay in *Little Sutton*. But it was ſtill further proved, againſt the ſecond point of this defence, that, even if the rectory had conſiſted in *Little Sutton*, of the tithe of hay, this defendant's pretence of his and *Thomas Whitile*'s purchaſe of that tithe, in 1733, *could not be true*.

The act of parliament, authorizing the ſale, recites, that *Charles Cholmondeley* had contracted ſeveral debts, for the payment of which it was propoſed, that the rectory of *Sutton*, and the tithes thereto belonging, (except the tithes of *Little Sutton*) ſhould be ſold. It therefore enacts, Act, 6 *Geo.* II. Exhibit from the office of the Houſe of Lords.

" That all the meſſuages, lands, *&c.* of the ſaid " *Charles Cholmondeley*, in *Great* and *Little* " *Sutton*, and the ſaid rectory of *Sutton*, and " the tithes thereto belonging (*except the* " *tithes thereto belonging in Little Sutton*) ſhould " be veſted in truſtees to be ſold," *&c.*

Thus it was ſhewn, by *negative* evidence, that the whole of this defence was *undeniably falſe*. But it was proved ſtill further *affirmatively*, by a variety of evidence, that the tithe of hay in queſtion had been conſtantly paid to the vicar *ſub modo*, inſtead of having compoſed part of the impropriate rectory, as alledged by the defendant.

Thomas Mercer, Int. 12. *W. Maſon*, Int. 7 & 12. *John Corfe*, Int. 12. *Joſeph Chritchley*, Int. 12. *Robert Hayes*, Int. 12. *John Grice*, Int. 7, 12, and 19. (Appendix, No. 1.)

It appeared, by the plaintiff's evidence, that the occupier of every farm-houſe, within the townſhip of *Little Sutton*, (as alſo of *Great Sutton*) had, beyond the memory of perſons now living, paid *to the vicar* for the time being, *one penny*, commonly called a *tilt penny*, in lieu of the tithe of hay ariſing from the lands occupied with ſuch farm-houſe; and *no more than one penny*, however ſuch farm might be varied, ſhifted, or augmented by junctions: and that no inhabitants of *cottages*, not having *mowing lands* held therewith, had ever paid ſuch tilt penny.

It was contended, on the part of the plaintiff, that ſuch a payment, conſidered as a *modus*, muſt be void in law, however long it might have obtained in point of uſage, on the following grounds and proofs.

I. That the number of farm-houſes, in any townſhip, being continually varying and uncertain, ſuch a *modus* muſt be continually varying, and uncertain likewiſe.

II. The

II. That this uncertainty and hardſhip is now actually experienced by the preſent plaintiff, the number of farm-houſes in *Little Sutton* having gradually diminiſhed from *eighteen* to *eight*, in the courſe of forty or fifty years laſt paſt. *John Johnſon*, Int. 9.

III. That the farm of the defendant *Whitehead*, in particular, had been much increaſed by repeated additions, and therefore had conſiſted, at different times, of different ſpecific parcels of land. *John Johnſon*, Int. 7. *Tho Mercer*, Int. 12.

IV. That thoſe (then) farm-houſes, from which this defendant took away ſuch lands, adding them to his own farm, did, before ſuch ſeparation, pay each a tilt penny to the vicar. *Tho. Mercer*, Int. 12.

V. That being, by ſuch ſeparation, reduced to *cottages*, they had paid *no tilt penny* to the vicar ſince ſuch ſeparation. *Joſ. Chritchley*, Int. 12.

VI. And that the defendant *Whitehead*, nevertheleſs, had paid *only one tilt penny* to the vicar, in lieu of all the tithes of all the hay of all the lands, as well anciently belonging to his farm, as of the lands from time to time added thereto. *Joſ. Chritchley*, Int. 12. (Appendix, No. 1.)

The caſe and defence of *Ralph Davies* were ſimilar to that of the laſt defendant, and therefore the ſame proofs, in a great meaſure, applied to both equally. The tithes, however, belonging to the impropriate rectory in *Great Sutton*, it was proved, were ſold under the act of parliament before ſtated. But it was in evidence, that the tithes of *corn and grain* were the only tithes, in this townſhip alſo, that were ever

As to the defendant *Davies* of *Great Sutton*.

Anne Croſs, Int. 14. (Appendix, No. 1.)

ever demanded or received by the rector, either before or since the sale of 1733; and the evidence of the tiltpenny was the same here as in *Little Sutton*.

Tho. Walker, Int. 17. (Appdix, No. 1.)

It was also proved, that these defendants, together with the defendant *Bateman*, had entered into a combination, composed of *forty-five* persons, to maintain and support the defence of this suit against the plaintiff.

It was remarked, that although the defendants *Whitehead* and *Davies* pleaded so *recent* a purchase of the tithe of hay in question from the *Cholmondeley* family, yet they did not produce a single title-deed as a proof of such purchase, notwithstanding they were repeatedly called upon for that purpose: an omission, which seems not to be accounted for, but on the presumption that such title-deeds, if produced by these defendants, would have given a *direct contradiction* to their own answers.

As to the defendant *Bateman* of *Great Sutton*.

The defendant *Bateman* was, in 1771, occupier of a farm wholly inclosed from the waste lands of *Great Sutton*, in 1735. She claimed to be intitled under the owner of the farm, as grantee from the abbey of St. *Werburgh*, to the tithe of hay demanded by the bill, in the same manner as insisted upon by the two last defendants. But she, like them, could produce no proof of possession or *enjoyment* of the tithe in question by the impropriate rector. And it seemed clear, that proof of a *modus* for tithe, paid to the vicar, under any form, entirely overthrew any pretence of *ownership* of that tithe in the impropriator. At the same time it seemed equally clear, that *no modus for hay* could protect any farm, the *whole* of which which was a *new inclosure* from the waste, such

ſuch waſte being before incapable, by reaſon of its lying open, of yielding that *ſpecies* of tithe.

Againſt this body of evidence, an argument was drawn in favour of theſe three defendants, from the ſilence of a certain ſurvey of the vicarage of *Eaſtham*, (produced againſt the defendants *Oxton* and *Healing*) reſpecting the tithe hay of *Great* and *Little Sutton*; but the obvious meaning of that ſurvey being to ſpecify *thoſe tithes alone*, which were then paid to the vicar *in kind*, ſuch omiſſion, it was urged, only proved, that no tithe hay *in kind* was yielded to the vicar in thoſe townſhips at the æra of that ſurvey, which would have been admitted on the part of the plaintiff without proof.

Much ſtreſs was laid, in the caſe of theſe defendants, on the words, "*tithes of hay*," having crept into a mortgage, made by ſome of the *Cholmondeley* family, which, it was ſaid, brought this within the principle of the caſe of *Henſhaw* and *Rotheram*, before Lord *Northington*. But it was anſwered by the court, that "nothing could be more unlike the "caſe thus cited, than the preſent caſe, there hav- "ing been in *Henſhaw* and *Rotheram*, a very long, "uninterrupted, *poſſeſſion and enjoyment* of the tithes "in queſtion, under a ſeries of family ſettlements, "in which thoſe tithes were *expreſsly given*: but that "no ſeizin or perception of the tithe hay of the "*Suttons* had ever been ſhewn in any of the *Cholmon-* "*deley* family, and therefore that ſuch mortgage- "deed could have no effective force or operation."

Henſhaw and *Rotheram*.

It was, laſtly, objected, that the preſent was a *new* caſe, the plaintiff having produced, and proved, *a modus paid to him*, in order to intitle himſelf to

tithes in kind. But it ſeems that the defendants ought not to have hazarded that objection, had they reflected, that the merit (if any) of that *novelty* was entirely their own, the plaintiff having been compelled to bring forward, and prove, the tilt-penny *modus*, from their almoſt unexampled *hardineſs* in denying it.

It muſt, however, be acknowledged, that theſe defendants did admit the payment of a tiltpenny to the vicar, but (conſcious, it is preſumed, of its illegality as a *modus*) did *not apply it to the tithe of hay.* The explanation which they gave of it, is here comprized in their own words, as no others ſeem capable of doing them equal juſtice: "And that the ſaid "*tiltpenny* is a *modus* in lieu of all other ſmall tithes "and vicarial dues in kind not at times taken in "kind, and herein excepted, as being ſo taken "in kind as aforeſaid, and except offerings." It is remarkable, that there was not one witneſs of the *ſixty-eight* examined (and croſs examined) in the cauſe, who ſupported, or even countenanced, theſe defendants in this explanation of the tiltpenny.

Jeſ Chritchley, Inſ. 12, at the end. (Appendix, No. 1.)

At the ſame time it was in proof, that the defendant *Whitehead*, in particular, *knew* that ſuch tiltpenny had been conſtantly paid for hay.

The defendant *Maddock* of *Whitby.*

As to the defendant *Maddock*, who employed a different ſolicitor, he ſet up the *modus*, called the *tiltpenny* (which the three laſtnamed defendants rejected) in bar to the plaintiff's demand of tithe hay, and reſted his whole cauſe on the hope of ſupporting it as a legal payment.

The defendants *Oxton* and *Healing* of *Nether-Poole.*

It may finally be ſubjoined, that the remaining defendants, *Oxton* and *Healing*, acting by the ſame ſolicitor as the defendants *Whitehead*, *Davies*, and *Bateman*

Bateman, did in like manner claim the tithe of hay ariſing on the demeſne, or townſhip of *Nether Poole*, as *part of the rectory of the pariſh*; and further ſet up a *modus* of forty ſhillings, as payable yearly to the vicar for ſmall tithes of that demeſne or townſhip.

The cauſe came on to be heard on 13 *July*, 1775, before the * *Honourable Lord Chief Baron* † *Smith*, Sir *James* † *Eyre*, and the late Sir *John* ‡ *Burland*; after ſix days hearing, it was ordered to ſtand over for the conſideration of the court.

On 18 *December* 1775, judgment was pronounced by Baron *Eyre*, (the court being unanimous) in the abſence of the Lord Chief Baron, who was indiſpoſed; at which time it was decreed,

That the defendants *Whitehead*, *Davies*, and *Bateman* "(*inaſmuch as their own defence had been clearly falſified, and the tilt-penny* modus *had been proved in the cauſe, to be a recompenſe for the tithe, wholly uncertain, and fluctuating in it's amount, ſhifting according to the occupation of the lands, liable to be reduced to a ſingle penny, if not to be totally annihilated, and therefore impoſſible to be ſupported as a legal payment*") ſhould ſeverally account with the plaintiff for the tithe hay demanded, *with coſts of ſuit*.

Carleton v. *Brightwell* (which ſee under *Trinity* Term, 2 and 3 *Geo.* II.) *Turton* v. *Clayton* (which ſee under *Trinity* Term, 8 *Geo.* I.)

That the defendant *Maddock* ("*inaſmuch as he had ſet up as fairly as he could, to give him a tolerable chance for ſucceſs, a defence upon the true ground of the caſe*") ſhould alſo account with the plaintiff for the tithe hay demanded, but without coſts; and,

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* *Right Honourable. J. R.* † See *Nomenclature of Weſtminſter Hall*," at the end of "The Biographical Hiſtory of Sir *William Blackſtone*," Octavo edit. 1782. ‡ See Id.

That the defendants *Oxton* and *Healing* (" *the parties differing as to what the compoſition for* Nether Poole *was, and to what it extended* ") ſhould be plaintiffs in a trial at law, in a feigned action, thereafter to be had on the *modus* pleaded, with the uſual directions.

This decree was chearfully ſubmitted to by the plaintiff, altho' ſome parts of the evidence reſpecting the demeſne of *Nether Poole* ſeemed previouſly to promiſe a more favourable event; the defendant *Maddock* alſo acquieſced; and he, and the other farmers of ſo much of the townſhip of *Whitby* as lies within the pariſh of *Eaſtham*, have yielded their tithe hay in kind to the plaintiff, which has ariſen ſince ſuch decree, as alſo their arrears of the ſame, from the year 1771, incluſive.

The Caſe of the Defendants, as ſtated in their Appeal.

The ſaid pariſh of *Eaſtham*, in the hundred of *Wirball* and county of *Cheſter*, conſiſts of a rectory impropriate, and a vicarage, and comprizes ſeveral townſhips, and particularly the townſhips of *Great Sutton* and *Little Sutton*.

The plaintiff is, and, from the year 1767, has been, vicar of the ſaid pariſh of *Eaſtham*, and as ſuch now ſets up a claim to the tithe of hay ariſing from the tenements in the ſaid townſhips of *Great* and *Little Sutton*, though he never took it in kind, nor, as the defendants inſiſt, did he ever receive any ſatisfaction for it.

The ſaid *William Whitehead*, in the year 1771, was the occupier of three ſeveral ancient tenements in

in the ſaid townſhip of *Little Sutton*, his own inheritance, and of two other tenements, in the ſaid townſhip, as tenant to *Thomas Whittle*.

The defendant, *Ralph Davies*, was in that year occupier of four ſeveral ancient tenements, in the ſaid townſhip of *Great Sutton*, under a leaſe for years from *George Buſhell*, the owner of the inheritance.

The defendant, *Elizabeth Bateman*, was then alſo occupier, as tenant at will, under *Thomas Cholmondeley*, Eſq; of a farm lately incloſed from the common of *Great Sutton*:

The ſaid *Thomas Cholmondeley* is the impropriate rector of that part of the ſaid pariſh of *Eaſtham*, which includes the ſaid townſhips of *Great* and *Little Sutton*, and is lord of the manor of *Suttons*; of which manor, rectory, and townſhips, the abbot and convent of the abbey of St. *Werburgh*, in *Cheſter*, were ſeiſed in fee at the diſſolution of monaſteries; and the ſame were, by King *Hen.* VIII. in the 33d year of his reign, with all tithes thereto belonging, (and other large eſtates in the county of *Cheſter*, the poſſeſſion of the ſaid late abbot and convent,) granted to the dean and chapter of *Cheſter* in fee.

The ſaid dean and chapter, in 7th *Edw.* VI. granted all this rectory (then and anciently called the rectory of *Sutton* in *Wirhall*) and the tithes thereof, and all the eſtate late of the abbot and convent, in the ſaid pariſh and other places, in the county of *Cheſter*, to Sir *Richard Cotton* in fee, paying to them the fee-farm rent of 60*l.* *per annum*.

George, the ſon and heir of Sir *Richard Cotton*, in the 7th *Eliz.* aliened this rectory, and the tithes thereto belonging,

belonging, with the manor, rectory-houſe, and church of *Sutton*, and all the meſſuages and lands in the townſhips of *Great* and *Little Sutton*, and all the tithes thereof thereto belonging, with other premiſſes, part of thoſe granted to Sir *Richard Cotton*, to Sir *Hugh Cholmondeley* in fee, paying the fee-farm rent therein reſerved to the ſaid *George Cotton*, who covenanted to indemnifiy againſt the ſaid groſs fee-farm rent of 603*l*.

This rent was ſurrendered by the ſaid *George Cotton*, to Queen *Elizabeth*, in the 22d year of her reign, with other rents reſerved by *Cotton*, on his ſeveral alienations of the different parts of the eſtates, which had been conveyed by the dean and chapter to Sir *Richard Cotton*, and all thoſe ſeveral rents were immediately granted by the ſaid Queen to the ſaid dean and chapter in fee, and they are at this time paid to the ſaid dean and chapter.

The ſaid townſhips of *Great* and *Little Sutton* (beſides the demeſne lands) conſiſt of ſeveral farm houſes and lands, and of a few cottages; all which were and continued to be the poſſeſſions of the *Cholmondeley* family, derivatively from the abbot, under ſuch title as before mentioned; till by an act of parliament paſſed 6 *Geo.* II. the ſame farms and lands (being then let out on ſeveral leaſes for lives, as they had been by ſucceſſive renewals during all memory), and the rectory of *Sutton*, and all tithes thereto belonging (except the tithes in *Little Sutton*) were veſted in truſtees to be ſold, and the reverſions in fee of all ſuch ſeveral leaſehold farms were accordingly ſoon after ſold in ſeveralty, with their ſeveral rights and appurtenances; and particularly the reverſion in fee of the ſeveral farms and lands ſo occupied by the ſaid *William Whitehead*, and the ſaid defendant *Ralph*

Ralph Davies, was then purchaſed, with the tithe hay ariſing therefrom, the ſame having been retained and enjoyed, with all ſuch ſeveral farms, during all memory, by the owners and occupiers thereof; but the tithes in *Little Sutton*, by the ſaid act excepted, ſtill remain in Mr. *Cholmondeley*.

The family of *Cholmondeley*, and their leſſees during all memory, prior to the ſaid act, and the alienations laſt mentioned, took the tithes of corn throughout both the ſaid townſhips of *Great* and *Little Sutton*, in kind; and the occupiers of the ſaid farms and lands, who were leſſees for lives under the *Cholmondeley*, uniformly, until ſuch alienations, enjoyed (as the purchaſers have ſince enjoyed) their ſeveral farms, and retained the tithes of hay to their own uſe, without any claim of tithes whatſoever in reſpect thereof, till the claim of hay tithe lately, and for the firſt time, ſet up by the plaintiff as vicar.

That no vicar of *Eaſtham* ever took any tithe of hay, within any part of the townſhips of *Great* and *Little Sutton*, in kind; nor, as the defendants inſiſt, hath any ſatisfaction been made for the ſame; nor did any vicar, before the plaintiff, ever claim any ſuch tithe there.

There are certain cuſtoms in the two townſhips of *Great* and *Little Sutton*, with regard to other tithes there, which cuſtoms have been uniform, and particularly well underſtood. From the demeſne lands of *Sutton*, the vicars have had a certain payment made them yearly at *Eaſter*, in nature of a penſion, in full of their dues; and throughout the other parts of the ſaid townſhips of *Great* and *Little Sutton*, the vicar hath immemorially taken in kind the tithe of pig, geeſe, wool,

wool, and lamb, beſides *Eaſter* offerings; and four diſtinct yearly payments, of one penny each, have been made at *Eaſter*, by the inhabitants of each houſe in the ſame townſhips, as *moduſes*, under the ſeveral denominations of the ſacrament one penny garden, hen, and tilt. And the defendants, when they put in their anſwer, not knowing the exact meaning of the word tilt, apprehended the tilt might be a payment in lieu of ſome ſmall tithe, and vicarial due, and the ſame was ſo ſtated in their ſeveral anſwers; but what they ſaid relating thereto was conjectural, founded on a definition of the term tilt, which in the dictionaries is called a compoſition for tithes generally, and the defendants were not then appriſed of what had been the application of the tilt in the ſaid pariſh, nor that one of the four pennies was a ſacrament, they not knowing then of the pariſh tithe-table, compriſing the vicar's dues, which the defendants have ſince cauſed the plaintiff to produce, and the ſame is ſtated in the appendix, and which was in the cuſtody of the plaintiff, or in his power, and not of the defendants; by which pariſh table the ſaid four ſeveral pennies are defined and called the hen garden ſacrament, and tilt, and the tilt is herein declared to be payable from every houſe.

1772, *Trinity* Term. Plaintiff's bill.

The plaintiff, in or as of *Trinity* Term, 1772, exhibited his bill of complaint in the court of *Exchequer*, againſt *John Oxton*, *John Healing*, and the defendants *Davies* and *Bateman*, and the ſaid *William Whitehead*; and againſt others, the occupiers of lands in the adjoining townſhips, within the ſaid pariſh, therein ſtating his induction to the vicarage of *Eaſtham*, in 1767, and that the vicarage had, for time immemorial, been endowed with the tithes of all hay, and ſmall tithe ariſing within the ſaid pariſh; and that

that he was intitled thereto by endowment: and that the ſeveral defendants in 1771, occupied divers ſeparate farms and lands within the ſaid pariſh, and had much hay thereon, and carried the ſame away without ſetting out the tithes thereof for the plaintiff, or making him any ſatisfaction; and therefore, the plaintiff (without alledging any other right than endowment, and without any allegation of any payment having been made, to which he objected; as in lieu of tithe hay, by way of *modus*, or otherwiſe, or any charge in his bill, ſtating any other right than endowment) prayed that the ſaid defendants might reſpectively account with him for the tithes of ſuch hay, and might ſeverally pay to him what ſhould be found due on ſuch account.

1772, *Michaelmas* Term. Defendant's anſwers.

The ſaid *William Whitehead*, and the defendants *Davies* and *Bateman*, in *Michaelmas* term following, filed their anſwers, and therein admitted, that they were, in 1771, occupiers of ſeveral tenements and lands in the ſaid townſhips of *Great* and *Little Sutton* as is before mentioned; and that they had hay thereon in that year, and took away the ſame, without ſetting out in kind, or making any ſatisfaction for the tithe thereof; but they denied that the ſaid vicarage was endowed with tithe of all hay ariſing within the ſaid pariſh of *Eaſtham*, or that the plaintiff was intitled to the tithe of hay from the ſeveral tenements that were ſo occupied by them reſpectively in 1771, or any of them, or any ſatisfaction for the ſame by endowment or otherwiſe; and they ſeverally ſaid that ſuch ſeveral tenements were ancient tenements, and ſet forth the particulars of which the ſame reſpectively conſiſted.

And the ſaid *William Whitehead*, by a further anſwer, ſtated the right of the ſaid abbot and convent

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at the time of their diſſolution, to the ſaid rectory of *Eaſtham*, and the tithes thereof, and the manor and townſhips of *Great Sutton* and *Little Sutton*, and that the ſame became veſted in Sir *Hugh Cholmondeley* as aforeſaid; and that the ſaid *Charles Cholmondeley*, Eſq; the deſcendant of the ſaid Sir *Hugh*, afterward ſold and conveyed to ſeveral perſons the ſaid ſeveral farms and lands in the ſaid townſhips of *Little Sutton* and *Great Sutton*; and particularly, that the ſaid *Charles Cholmondeley* had ſold and conveyed unto him the ſaid *William Whitehead*, ſuch of the tenements and lands in *Little Sutton*, which were occupied by him in 1771, called *Harvey's*, *Hughſon's*, and *Powell's* tenements; that he believed the purchaſers of the ſaid ſeveral eſtates, ſo ſold, within the ſaid townſhips of *Little Sutton* and *Great Sutton*, had, ever ſince their ſeveral purchaſes, held and enjoyed all the tithes of hay ariſing on ſuch their eſtates; and he the ſaid *William Whitehead* inſiſted, that he was intitled to the tithe of hay of the ſaid farms and lands, of which he was owner and occupier in 1771, as the ſame all lay in the ſaid townſhip of *Little Sutton*, and were purchaſed of the ſaid *Charles Cholmondeley*; and believed that the ſaid *Charles Cholmondeley*, and his anceſtors, and thoſe under whom they claimed, and their ſeveral aſſigns and leſſees for time immemorial, had received, taken, and enjoyed the tithes of corn, grain, and hay, ariſing from all the tenements and lands within the ſaid townſhips of *Little Sutton* and *Great Sutton*, free from any claims whatſoever of the vicars of the pariſh of *Eaſtham* for the time being; and that the vicars of the ſame pariſh were never endowed with, and that the plaintiff had no claim or right by endowment, or otherwiſe, to the tithe of hay ariſing from any lands or tenements in the ſaid townſhips of *Little Sutton* and *Great Sutton*, and he denied that the plaintiff had any right to ſuch tithe of hay.

The

The defendant, *Ralph Davis*, by his further anſwer to the ſaid bill, ſaid, that he held the farms deſcribed by him in his firſt anſwer as tenant for years, and claimed to hold the ſame as tenant to his landlords, who claimed the tithe hay thereof; and he inſiſted on the like enjoyment of the ſaid hay, as the ſaid *William Whitehead* had inſiſted on as aforeſaid; and ſaid he believed that no tithe of hay had ever been taken from the ſame lands by any vicar, or any ſatisfaction made to him for the ſame, and denied the right of the plaintiff to ſuch tithe.

And the defendant, *Elizabeth Bateman*, by her further anſwer to the ſaid bill, ſaid, that ſhe held the ſaid farm which had been incloſed from the ſaid common of *Great Sutton*, as deſcribed in her ſaid former anſwer, in the year 1771, only under the ſaid *Thomas Cholmondeley*, the impropriator of the great tithes, and lord of the ſaid manor of *Great* and *Little Sutton*, who had let the ſame farm to her, free from ſuch tithe of hay and other tithes; and that ſhe, and the former occupiers thereof, had held and enjoyed, as tenants to Mr. *Cholmondeley*, all the corn and hay ariſing therefrom, free from any tithe; and that no vicar had made any claim thereof before the filing the ſaid bill, and denied that the plaintiff had any right thereto.

The plaintiff replied to the ſaid anſwers of the defendants; and the cauſe being at iſſue, witneſſes were examined on behalf of all parties, and publication duly paſſed.

The cauſe came on to be heard before the honourable the Barons of the *Exchequer*, when the counſel for the defendants objected for want of proper parties,

ties, none of the land owners, (ſave the ſaid *William Whitehead*, a land owner as to part of the tenements in his occupation) nor the impropriator being parties to the ſuit; and that the vicar's right being denied, they ought to have been defendants: but the court was pleaſed to over-rule ſuch objection of the defendants, and proceeded in and finiſhed the hearing.

The plaintiff's written evidence read on ſuch hearing conſiſted chiefly of looſe papers and copies not verified or authenticated; no original being produced or proved to exiſt, and the reading of them, as evidence, was therefore objected to on the part of the defendants; but the objections were over-ruled by the court.

The plaintiff's oral evidence (which conſiſted of the facts being ſpoken to only as to the information and belief of the witneſſes, and in ſuch manner as it is apprehended would not be admiſſable evidence at law) was chiefly to prove, that the tilt penny was imagined by the witneſſes (but without giving any reaſons) as a payment for hay, due from every farm-houſe, having lands, to the vicar, and extended to cover ſuch lands; and the argument drawn from thence was, that it would be impracticable to collect the penny by reaſon of the lands being taken from one farm houſe, and added to another; and therefore that the payment of the ſaid penny would be ſhifting, uncertain, and therefore void as a *modus*; but ſtill that it was evidence of the vicar's being entitled to the ſaid tithe hay; that ſuch evidence was unſuſpected, and a ſurprize upon the defendants, and ought not to have been admitted, there not being a word ſaid about it in the bill, nor was it thereby put in iſſue in any manner; and therefore the defendants had

had no opportunity of making any defence to it, or contradicting the plaintiff's evidence relating to it, or of croſs examining any of the witneſſes ſo produced, as to the application of the ſaid tilt penny.

That the plaintiff could not, nor did prove, that he, or any of his predeceſſors, had ever taken the ſaid tithes of hay in kind.

The defendants read in evidence, on ſuch hearing, the ſeveral exhibits in the firſt part of the appendix to this caſe, in which it is apprehended the title in the land owners to the lands in queſtion, derivately from the abbot and convent, is ſatisfactorily deduced; and by which it appears that the tithe of hay has always been conſidered, by the land owners and occupiers, as their own private property, and conſtantly and immemorially retained and enjoyed by them; and they proved that the plaintiff nor any of his predeceſſors, had ever taken the ſaid tithe hay, and that it was the reputation of the pariſh that he was not intitled thereto.

That on the 18th *December* 1775, the ſaid court of *Exchequer* was pleaſed to decree, that the ſaid defendant *William Whitehead*, and the defendants *Ralph Davies* and *Elizabeth Bateman*, ſhould ſeverally come to an account with the plaintiff for the tithe of hay demanded of them by the bill, and that they ſhould pay unto the plaintiff the coſts of ſuit to that time, ſo far as the ſame related to the ſaid *William Whitehead* and the defendants, and the ſaid demand againſt them reſpectively. 1775, *December* 18. Firſt decree.

See this cauſe, on the rehearing, under Trinity *Term*, 17 Geo. III. *and on the appeal, under* Hilary *Term*, 19 Geo. III. *and the* APPENDIXES *thereunto ſubjoined.*

Hilary Term, 17 Geo. III.

February 14, A. D. 1777.

In the *Houſe of Lords.*

Hans Wintrop Mortimer, Eſq; and *Robert Kirkman*, gentleman, } Appellants.

Owen Lloyd, Clerk — Reſpondent.

The Appellants's Caſe.

THE appellants conceive themſelves to be aggrieved by the decree in the original cauſe [which ſee under *Michaelmas* Term, 16 *Geo.* III.] and being adviſed, that the reſpondent's bill ought to have been diſmiſſed, have appealed from the ſaid decree which they humbly hope will be reverſed, for the following (among other)

REASONS.

1. Terriers ſigned by the incumbent intitled to tithes, and by the church-wardens or inhabitants of the pariſh, who are liable to the payment of tithes, are admitted to be read in evidence, as the declarations of parties ſtanding in oppoſite intereſts, but *both* intereſted in the manner of rendring tithes within the ſaid pariſh, and no terrier is perfect, or ought to be admitted in evidence, if ſigned by the incumbent only, or by the inhabitants only; the above terrier of 1665, which was received in evidence in this cauſe, appears to be ſigned by *John Lucas* the vicar, and by four perſons, who are ſtiled

church-wardens, and are to be presumed to be the church-wardens of the church of *Stapenhill*, which is the parish church, and not the chapel-wardens of the chapelry of *Caldwall*.

It is therefore improper to be admitted in evidence, as only one of the parties signing the terrier is interested in the payment of tithes in *Caldwall* (namely) the vicar, and the rest of the parties not; and is no more admissible in evidence, respecting the payment of tithes in *Caldwall*, than a terrier signed by the vicar of *Stapenhill*, and the inhabitants of a neighbouring parish; if the terrier be read, it only proves the impropriety of giving countenance to it as evidence; the substance of the terrier, so far as regards the present cause, being no more than the assent of the vicar and four *marksmen* to a proposition in the following terms, "pigs, geese, wool, and lamb, are paid in the parish of *Stapenhill* and town of *Caldwall* according to the ancient law *fœtus ablactatus debet esse antequam præstetur*; and hay, hemp, flax, calves, colts, fruit, and offerings, are paid in the parish, and from all the town of *Caldwall* without exception, for this vicarage anciently was endowed *omnibus minutis decimis.*"

2. It is undoubted in this cause, that the vicar's right to tithe in kind within the chapelry of *Caldwall* was denied one hundred years ago.

That by an agreement, with the concurrence of the parson, patron and ordinary (which there is no reason to suspect to have been unfair) a certain annual payment was recognized and established, not as a composition for tithes payable in kind, but as a

compromiſe of a diſputed claim; that by means of ſuch agreement having ſo long ſubſiſted, all memory and trace of any other payment is loſt and obliterated.

Under which circumſtances, it is ſubmitted, that it is inequitable to permit the vicar to avail himſelf of his general title; the appellants therefore hope, that the reſpondent's bill in equity ſhall be diſmiſſed.

The Caſe of the Reſpondent.

From the decree [which ſee under *Michaelmas* Term, 16 *Geo.* III] the appellants have appealed to your lordſhips; but the reſpondent hopes, that the ſaid decree will be affirmed, for the following (among other)

REASONS.

1. The reſpondent proved his right to the ſeveral *ſpecies* of tithes claimed by his bill, in other parts of of the pariſh, and there was no pretence that any body elſe had any title to tithe in kind; the ſingle queſtion is, whether the payment of ſix pounds is a legal exemption from payment of tithe in kind, there is no evidence that the payment exiſted before the deed of 22d *September*, 1676; the terriers are evidence to the contrary, and the indenture of 22d *September*, 1676, doth not contain any declaration of or reference to any *modus*, or cuſtomary payment, then exiſting within the ſaid pariſh; but on the contrary, from the whole tenure and effect of the ſaid indenture, it appears to be no more than an ineffectual attempt to make a real compoſition, at a time when all parties to that deed were by law diſabled from making any compoſition whatſoever, binding

or

or obligatory on the ſucceſſors of the vicar; and therefore it is conceived, that the ſaid indenture, inſtead of maintaining the pretenſions of the appellants, affords the ſtrongeſt preſumption, that no ſuch *modus*, or cuſtomary payment, as contended for by the appellants could have exiſted at any time when that deed was executed; otherwiſe it muſt be preſumed, that ſuch *modus* muſt have been known to the inhabitants of the village or hamlet of *Caldwall*, who are parties to that indenture; and it is highly unreaſonable to ſuppoſe, that they would have omitted to take notice of ſuch *modus* or cuſtomary payment, in caſe any ſuch had then exiſted.

2. The parol evidence produced on the part of the appellants, does not amount to any proof of ſuch *modus* or immemorial cuſtomary payment, as contended for by the appellants; but on the contrary, ſuch parol evidence, when connected with the indenture of 22d *September* 1676, amounts to no more than a proof of an acquieſcence under the temporary compoſition (introduced for the firſt time by that deed) on the part of the ſeveral vicars of *Stapenhill*, ſince the making of that indenture; which acquieſcence is not in any ſort concluſive or binding on the reſpondent.

February 14, A. D. 1777.

Ordered and adjudged, that the appeal be diſmiſſed, and that the order or decree therein complained of be affirmed. The judgment of the Houſe.

See the original cauſe, under Michaelmas *Term*, 16 Geo. III.

Eaſter Term, 17 Geo. III.

May, 13, A. D. 1777.

In the *Houſe of Lords.*

Pinckney Wilkinſon, Eſq; Appellant.

Bryan Allott, Clerk; Reſpondent.

The Appellant's caſe.

THE appellant humbly apprehends he is aggrieved by the order of 4 *Feb.* laſt, and hopes that the ſame may be reverſed, and a *new trial of the iſſue*, in original cauſe [which ſee under *Eaſter* Term, 15 *Geo.* III.] may be granted, for the following (among other)

REASONS.

1. The maxim of *nullum tempus occurrit eccleſiæ*, of which the reſpondent can avail himſelf, applies no further, than that no ſtatute of limitations can be actually pleaded in bar to the rights of the church, but that the maxim diminiſhes not the right of the party, adverſe to the claims of the church, which is deduced from the length and operations of time, and as the appellant and thoſe from whom he claims, have had *immemorial* and *uninterrupted ſeiſin* of moſt part of the lands compriſed in the verdict, *till the year* 1772, when the reſpondent forcibly took poſſeſſion of twenty-nine acres, which have been ſince recovered by an ejectment brought by the appellant, a court of juſtice will ſo far protect a title purchaſed for a valuable conſideration, and guarded by length of time, as not to have it totally defeated by one trial at law; and by a claim founded in *preſumption*, and *not poſitive proof.*

3. The

2. The verdict is erroneous, becauſe it comprehends lands belonging to the pariſh of *Burnham Norton*, and the iſſue is confined to the conſolidated pariſhes of *Burnham Weſtgate*, and *Ulph*.

3. The admitting maps as competent evidence, in all the caſes, where they ſhall be found in the poſſeſſion of the perſon againſt whom they ſhall be produced, unaccompanied by any evidence of the occaſions or purpoſes for which the ſame were made, cannot but be highly dangerous to the property of every landholder in the kingdom, but more ſo, when ſuch maps ſhall appear to have been, for a conſiderable ſpace of time, in the hands of a perſon claiming under an adverſe title; in the preſent caſe, notwithſtanding ſeveral objections were made both to the *competence* and *credit* of the map made in 1648, the judge was pleaſed to give no weight to any of the ſaid objections, but to paſs them all over, becauſe, as he informed the jury, *all maps, as well as other written evidence, had been ordered by the court of* Exchequer, *which was a court of equity, to be produced at the time of the trial*; whereas it is a well known *rule of law*, that ſuch *order* is never conſtrued or underſtood to extend to give either *competence* or *credit*, to any map or inſtrument, which would nothave been intitled to *competence* or *credit*, without ſuch order, as evidence to be admitted in a court of law; and it is remarkable, that in the preſent caſe, the witneſſes examined, at the time of the trial, the map and the terrier contradict one another.

4. Suppoſing the map to be free from all objection, and even to have been concluſive evidence, yet the contents thereof do not warrant the verdict found; for as the meaſures of the ſeveral pieces of land are

not marked upon them, this circumſtance does not only render the map more liable to alteration by the *interpolation* of a line or letter, but makes it neceſſary to ſupply the quantity from other evidence; it has been attempted to effect this by the teſtimony of *John Willock* the ſurveyor, who ſwears, that he meaſured the ſeveral pieces marked *M*, *N*, and *O*, by a ſcale on the map; but there is a palpable abſurdity in *Willock*'s evidence, that deprives it of all credit; he ſwears that the *abuttalled* lands meaſure ſixty-four acres, and thirty-four poles, and the *unabuttalled* lands, twenty acres, and twenty-ſix poles, which laſt (if any ſuch there are) it is obvious he could not poſſibly meaſure with a ſcale.

5. It appears that the ſurveyor meaſured all the lands marked *M*, *N*, and *O*, and that the aſſociate took down the particulars and amount of all thoſe pieces; the judge referred the jury to what the aſſociate had taken down, and the verdict of the jury was manifeſtly directed by the aſſociate's account, yet letter (*N*) appears by the map to denote lands belonging to the rectory of *Burnham Norton*, to which the iſſue does not extend.

6. The defect in the proof of quantity is not cured by the terrier of 1706, where the quantities are expreſſed, not in words, but in figures only, becauſe that terrier is not ſigned by the owner or occupier of the lands which belong to the appellant, and is contradicted by two ſubſequent terriers, ſigned by the predeceſſor of the reſpondent, rector of the conſolidated pariſhes of *Burnham Weſtgate* with *Ulph*.

7. That if a new trial ſhall be granted, the reſpondent may *ſtill* have an opportunity of making out

out the quantity of the glebe land he is intitled to, but if ſuch trial ſhould be *refuſed*, the appellant and his heirs will be *bound* by the laſt verdict, and can *never* have any *redreſs*.

OBJECTIONS *to the competency and credit of the map on which the reſpondent's right is founded to the glebe lands in queſtion, humbly ſubmitted on the part of the appellant.*

1. The map having been delivered to the predeceſſor of the reſpondent, and in his poſſeſſion, it is totally deprived of it's original validity, as applied to the right of the appellant, more eſpecially when raſures and alterations evidently appear to have been made upon it, in many places, and in particular, upon the pieces which relate to the glebe.

2. No acquieſcence to the deſcriptions of the map, has ever been ſhewn by any perſon whoſe property this map is ſaid to deſcribe, to denote the accuracy, or prove the authenticity of it, nor is it ſigned by any of the perſons whoſe rights are affected by it, though it is made to deſcribe whole pariſhes, and the poſſeſſions of different proprietors.

3. The ſpecific quantity each piece contains is not marked, nor is there any account of what quantity of lands in general is belonging to ſuch proprietor, but from the letters of reference, which are liable to interpolation, as is the quantity of each piece to augmentation by eraſures, or diminution by the inſertion of a line; the quantities contained in each piece, by admeaſurement from a ſcale, muſt be extremely uncertain, and muſt depend upon an accuracy in the delineation, which ſcarcely any map will

will admit of, and leaſt of all, a map, which, notwithſtanding the declaration of *Willock* the ſurveyor, has, on the face of it, the moſt palpable marks of negligence and inaccuracy; there are ſeveral pieces deſcribed on the map, to which even at this time no letter is affixed, and there is one piece on which ten different letters are annexed, referring to different pariſhes.

4. The map was in the poſſeſſion of the reſpondent's agents for a conſiderable time; copies were clandeſtinely taken of it without any application to the court of *Exchequer*, and the pretended ſurvey made in the ſame clandeſtine manner, without the knowledge of the appellant; therefore, and for other reaſons to be offered at the hearing, the appellant humbly hopes, that a new trial will be granted.

APPENDIX

OF

The TERRIERS in the Biſhop's Regiſtery, relating to the Pariſhes of Burnham Saint Mary's, *otherwiſe*, Burnham Weſtgate.

Burnham Weſtgate Terriers.

1706, *June* 5.	This terrier is ſigned by *Henry Spurling*, rector, glebe lands amount to	A. 83	R. 2	P. 00

Note, *This terrier was exhibited by the reſpondent on hearing this cauſe, and at the trial at the aſſizes.*

Note

Note alſo, *The laſt article in this terrier is as follows*, viz. *there are belonging to the rectory in the* Brecks *and* Fold Courſes, *which cannot be abuttalled, twenty acres, two roods, and the quantities are only in figures, not in words; and in all the ſubſequent terriers, the lands, not abuttalled, are deſcribed as two acres and two poles.*

		A.	R.	P.
1709, *May* 23,	This terrier is ſigned by *Spurling*; glebe lands amount to	50	2	20
1716, *July* 7,	This terrier is ſigned by ſaid *Spurling*; glebe lands amount to	47	1	20

Note, *This appears to be ſigned by* Thomas Harris, Eſq; *former owner of the defendant's eſtates and both theſe were produced by the reſpondent at the trial.*

1723, *July* 2,	This terrier is ſigned by *Samuel Thurlow* and *Thomas Higgins*, churchwardens of the ſaid pariſh; glebe lands amount to	49	0	20
1725, *June* 7,	This terrier is ſigned by *Thomas Groome*, rector; glebe lands amount to	49	0	20
1729, *June* 18,	This terrier is ſigned by the ſaid *Thomas Harris*, church-warden; glebe lands amount to	49	0	20
1735, *July* 8,	This terrier is ſigned by the ſaid *Thomas Groome* and *Thomas Harris*; glebe lands amount to	49	0	20

1740,

1740, *July* 1,	This terrier is ſigned by *John Thornhill*, church warden; glebe lands amounts to -	49	0	20
1747, *July* 14,	This terrier is ſigned by *William Smith*, rector; glebe lands amount to	49	0	20
1753, *June* 22,	This terrier is ſigned by the ſaid *William Smith*; glebe lands amount to -	49	2	20
1760, *July* 8,	This terrier is ſigned by the ſaid *William Smith*; glebe lands amount to -	49	2	20

1763, *June* 6. *This terrier is ſigned by* Nicholas Raven *and* Michael Dewing, *church wardens, and it ſets forth, that there being a diſpute or difficulty in ſetting out the glebe lands belonging to* Burnham Weſtgate *aforeſaid, they the ſaid church-wardens were not able to make a true and perfect terrier, and begged leave therefore to refer the ſame to the terriers, as formerly given in by the late reverend* Henry Spurling *and others, formerly rectors of the ſaid pariſh of* Burnham Weſtgate.

The Reſpondent's Caſe.

From the ſaid order the appellant has appealed; but the reſpondent humbly hopes that the ſame will be affirmed, and the appeal diſmiſſed with coſts;

For that the verdict will be found to be well warranted by, and the clear reſult of the evidence.

OBJEC-

OBJECTIONS.

The objections to it, as ſtated at the time of the motion for a new trial, were,

Firſt, That the map and terrier produced were in evidence inadmiſſible, being of a private nature, and under controul of thoſe whoſe intereſt may be affected by them.

Secondly, That the inquiry at the trial was extended to the pariſh of *Norton*, as well as the pariſhes of *Weſtgate* and *Ulph*, whereas the latter only were mentioned in the iſſue.

Thirdly, That upon the evidence it did not appear, that the reſpondent had any ſeiſin of the glebe in queſtion.

ANSWERS.

The objection to the map appeared to be rather extraordinary, as it was made under the directions of the lord of the manor for the time being, was produced by the appellant, the preſent lord of the manor, and ſeems therefore to be evidence perfectly unexceptionable as againſt him; the terrier was authenticated by the ſignature of the rector, the pariſh officers, and other conſiderable inhabitants of the pariſh, and was produced from the biſhop's regiſtry, the proper repoſitory for ſuch inſtruments; in queſtions of this ſort, it is apprehended, terriers are always received in evidence, and in this inſtance the terrier and the map, by their coincidence, derive additional credit from each other.

The

The parishes, though originally three, have long been, and are now consolidated, and therefore more properly one, which is familiarly known in the county by the name of *Burnham*; the respondent holds them all by one and the same title, and the question in the court of *Exchequer* was, whether the title supported his claim to the lands in question, so that *Norton* was substantially, though not literally within the terms of the issue.

As to the objection for want of seisin; if that objection means, that the respondent personally had not possession, it is the very grievance he complains of; but if it appears, as it is submitted it does, satisfactory from the evidence, that his predecessors were in possession in 1706, the date of the terrier, or even in 1648, the date of the map, though that possession has been since injuriously taken and withheld from him, it is apprehended, that there is sufficient evidence of seisin, as far as seisin is necessary for such a claim; in fact, the respondent is still in possession of what his neighbours have thought fit to leave of the glebe.

May 13, A. D. 1777.

The judgment of the House.

Ordered and adjudged, that the appeal be dismissed, and that the order therein complained of be affirmed; and it is further ordered, that the appellant do pay to the respondent *one hundred and fifty pounds* costs.

See the original cause, under Easter *Term*, 15 Geo. III.

Trinity

Trinity Term, 17 Geo. III.

July 1, A. D. 1777.

In the *Exchequer*.

George Travis, Clerk, — Plaintiff.

Thomas Whitehead, *William Whitehead*, and *John Bowker*, executors of the last will and testament of the late *William Whitehead*, deceased; *Ralph Davies*, *Elizabeth Bateman*, *Thomas Maddock*, *John Oxton*, and *John Healing*, — Defendants.

*** *The case of the plaintiff on the rehearing, as stated by his own pleading, in the printed cases of appeal, delivered to the Lords, counsel, and parties concerned, previous to the hearing, with the manuscript judgments of the House indorsed thereon.*

IN *January* 1776, the defendant *Whitehead* died, whereupon the plaintiff filed a bill of revivor against his executors, *Thomas Whitehead*, *William Whitehead*, and *John Bowker*.

On the first day of *Hilary* Term, 1777, all the surviving defendants, except *Maddock*, applied for an order to *rehear* the cause, but without specifying any grievance; which order they obtained as of course, as also another order, soon afterwards, to rehear as to the executors of the late *William Whitehead*.

On

On 9th *June* 1777, the rehearing of this cause came on before the * Honourable Lord Chief Baron † *Smythe*, Sir *James* ‡ *Eyre*, Sir *Beaumount* § *Hotham*, and Sir *Richard* ‖ *Perryn*; on this rehearing no new evidence was introduced into the cauſe, ſave the tithe table of the pariſh (exhibit *L.*) on the part of the defendants, and the terriers of the pariſh (which, on the former hearing, were read by ** the defendant *Maddock*) on behalf of the plaintiff.

The new evidence, thus introduced by the defendants, was intended to ſerve the caſe of the defendants the executors, *Ralph Davies*, and *Elizabeth Bateman*, only; indeed the defendants *Oxtoby* and *Healing*, though petitioners for a rehearing, did not ſeem to have any grievance to complain of.

The clauſe in the tithe table, which reſpects the tilt penny, is as follows:

Tithe table (Appendix, No. 4.)

"*Eaſter* dues in *Whitby* and the two *Suttons*; no hay; no tithe calves; no mortuaries; only a penny a cow; and from every houſe, a tilt penny."

The counſel for the defendants wiſhed to ſtop at the words "*no hay*;" but being ordered to proceed, the court declared the true conſtruction of the ſentence to be; "*in* WHITBY *and the two* SUTTONS *no mortuaries*" are paid; "*no tithe calves*; but in lieu thereof "*a penny a cow*;" "*no hay*," but in lieu thereof "*from every houſe a tilt penny*:" and thus the *tithe table* was adjudged to ſpeak the ſame uniform language with the reſt of the evidence in the cauſe.

* *Right Honourable. J. R.* † See "*Nomenclature* of *Weſtminſter-hall*," ſubjoined to "The Biographical Hiſtory of Sir *William Blackſtone*." Octavo edit. 1782. ‡ See Id. § See Id. ‖ See Id.

** The parties *ſeldom* read *their own* proceedings in court. *J. R.*

The

The *terriers* produced by the plaintiff, added their teſtimony, in the ſtrongeſt manner, to the former proofs on his behalf, reſpecting this tilt-penny *modus*, that of 1686 declaring, that Terrier, 1696. (Appendix, No. 2.)

> " Great Sutton *and* Little Sutton *and* Whitby, *are free from paying of tithe hay, every houſe paying a penny called tilt penny*; upon what account we know not."

And that of 1709.

> " Sutton Magna, *as alſo* Sutton Parva *and* Whitby, *pay only one penny an houſe for their hay*; upon what account we know not." Terrier, 1709. (Appendix, No. 3.)

The defendants did not, on this rehearing, offer to impeach the fact of the tilt-penny *modus* having been paid, as before proved; their objections to the decree (ſome of which were alſo urged on the original hearing) [which ſee under *Michaelmas* Term, 16 *Geo.* III. were chiefly as follows:

Obj. I. The plaintiff has ſtated, in his bill, that he is *entitled by endowment*, without ſpecifying therein the kind of endowment, or the evidence he had to ſupport it.

Anſwer. There is a well known, legal diſtinction between *the fact* and *the evidence of the fact*. Although a plaintiff is bound to ſtate the fact, in his bill, he is not bound to diſcloſe, at the ſame time, the evidence of that fact.

Obj. II. The evidence of payments made to the vicar, *in the reſt of the pariſh*, ought not to have been

been read, as being the evidence of *facts not in iſſue in the cauſe*.

Anſwer. The fact in iſſue between the parties is, *the vicar's endowment*. To this point, or fact in iſſue, both parties are to adduce their evidence. The *written endowment*, in the preſent caſe is loſt. But *a writing* is only *one* ſpecies of evidence of an original endowment. *Enjoyment* is alſo proof of ſuch an endowment. Proof, therefore, of a perception of the tithes in queſtion, in the *reſt of the pariſh*, gives the plaintiff a *general*, *primâ facie*, title to recover, by implying a *general endowment*.

But beſides this *general title*, the plaintiff has, in the preſent caſe, alſo proved a *particular title*. He has ſhewn an actual *poſſeſſion and enjoyment* of the tithe in queſtion, in his predeceſſors and himſelf, by proving a *modus*, or compoſition, paid to them and him, as a ſatisfaction for that tithe.

Obj. III. Proof of a bad *modus*, paid to a vicar, does not give to him (as it would to a rector) a right to tithe in kind.

Anſwer. Tithe in kind is the original, legal, right. A *modus* is, a *manner of paying that tithe*. To whomſoever that *modus* is paid, whether rector or vicar, ſuch payment implies the original right to have reſided in that perſon. If ſuch payment ſhall appear, on proof made, to have the legal requiſites, it is eſtabliſhed as a binding payment.

ment. If otherwiſe, it is declared to be no longer obligatory, and the original right revives, the right to take the tithe in kind for which ſuch payment had been ſubſtituted.

Obj. IV. The impropriator denies the vicar's right; and therefore the court is bound to direct a trial at law.

Anſwer. Where there is proof in a cauſe, ſatisfactory to the court, of the vicar's right, the conſcience of the court, ſo ſatisfied, will not, *in any caſe*, think itſelf bound to direct a trial at law, merely becauſe the impropriator takes upon him to deny that right. But, in the preſent caſe, there is *no impropriator before the court*. The defendants, who requeſt this iſſue, are *ſubtracters of tithe* only, who, conſcious of its illegality, have dared to deny the *modus* which they, and their fathers, have paid, and to aſſert, that they have purchaſed the tithe in queſtion from the impropriator, although at the ſame time they have not ventured to produce their own title-deeds from, nor have been able to prove a ſingle act of ownerſhip of the tithe demanded, in the impropriator, in ſupport of ſuch an allegation.

Obj. V. The impropriator is, with reſpect to tithes, as an heir at law with reſpect to lands.

Anſwer. The impropriator is not, in any ſenſe, as an heir at law in the preſent inſtance. The

plaintiff has proved an original endowment of the tithe in queſtion, by ſhewing, that it has *always been paid to him*, and to his predeceſſors (although not in kind) even within the townſhips in diſpute, and *never* to the impropriator. Theſe tithes, therefore, being included within the circle of the vicar's endowment, the impropriator has, with reſpect to them, no right whatſoever, either preſent or future, either in exiſtence, or expectation.

Obj. VI. The right of the parties will be bound by the decree which has been pronounced.

Anſwer. The bill was for ſubtraction only. The decree is only for an account. It binds no right; it precludes *(if any ſuch are meditated)* no future litigations.

Obj. VII. Legal rights are not to be decided by a court of equity: they are triable only at common law.

Anſwer. The experience of every day repels this aſſertion. Almoſt all the cauſes which come before courts of equity are upon queſtions of legal right. Where the evidence of the facts, reſpecting ſuch legal right, is irreconcileably contradictory, iſſues at law are directed to aſcertain thoſe facts; becauſe "*Ex facto oritur jus.*" But where the fact is clear, it is a *new kind of prohibition*, to ſay that a court of equity is not competent to decide upon the *law, ariſing from that fact.*

Obj. VIII.

Obj. VIII. In the caſe of *Carte* againſt *Ball*, "*which runs on all fours with the preſent*," the late Lord *Hardwicke* directed an iſſue to try whether the vicar was *entitled* to the tithe demanded by the bill.

Anſwer. This caſe (which is very erroneouſly reported in *Atkyns* as well as *Vezey*) bears not the ſmalleſt ſimilitude to the preſent. The plaintiff there demanded *all* tithes (corn as well as other tithes) ariſing within the hamlets in ſuit, and yet produced no evidence whatſoever of an endowment, either in writing, or by proof of enjoyment of any tithes in any part of the pariſh. The dean and chapter of *Weſtminſter*, the appropriators, being parties, denied the plaintiff's right, and ſhewed an *expreſs grant* to them, as appropriators, of the very tithes in queſtion from the crown.

Caſe of *Carte* againſt *Ball*, in *Chancery*. (Appendix, No. 5.)

But, in the preſent caſe, the plaintiff does *not demand the tithe of corn*; he *has proved his endowment*, by *actual perception*, in every part of the pariſh, *even in the places in ſuit* by the bill; *the impropriators are not parties, they do not*, therefore, *deny his right*; and *no grant* to them of the tithe in queſtion by the bill has been, or can be, ſhewn by them, or by the defendants.

Obj. IX. The juriſdiction of the court of *Exchequer* over tithes is not *original, and immediate*, but only *incidental and collateral*, as to diſcovery and account.

Anſwer. From the nature of its inſtitution (which was to protect ſuch property as belonged to the crown) the court of *Exchequer* had an original and compleat juriſdiction over tithes. The King is *perſona mixta*, a ſpiritual as well as a lay perſon; and tithes have at all times, particularly thoſe ariſing from extra-parochial places, been part of his revenue. From the earlieſt reports, or records of law, it appears, that the court of *Exchequer* hath uniformly exerciſed this paramount power over tithes; and, even were the point problematical, the conſtant practice of the court, for ſo many centuries, would now warrant the exerciſe of ſuch immediate and abſolute juriſdiction.

It was a remark, reſpecting this laſt objection, which fell with ſome ſeverity from the court, that it was proceeding much to far, to endeavour to *ſerve a particular cauſe*, by advancing ſuch doctrines, as, if received, would ſet afloat a great part of the property in the kingdom, and revive litigations, which have been for ages conſidered as at reſt, under the ſanction of the decrees of that court.

July 1ſt, 1777. Decree on the rehearing.

The rehearing continued four days; and the court took a fortnight's time to conſider of the arguments urged by the counſel on both ſides; at the end of which, on *July* 1ſt, 1777, the court (except Baron *Perryn*, who, having been counſel for the defendants on the original hearing, gave no opinion) pronounced judgment *ſeriatim*, unanimouſly affirming the former decree.

The caſe of the defendants, as ſtated by their caſt on the appeal, delivered to the Lords, counſel, and parties concerned, previous to the hearing, with the manuſcript judgments of the Houſe indorſed thereon.

The ſaid *William Whitehead* died on 4th *January*, 1776, before the ſaid decree was drawn up, and in *Hilary* Term following, the plaintiff filed his bill of revivor againſt the defendants, the executors of the ſaid *William Whitehead*, and the cauſe was revived againſt them.

The defendants, on diſcovering the tithe-table of the vicar's dues, exhibited by him, on the examination of witneſſes, but withheld at the hearing, ſeverally petitioned to have the cauſe reheard, and that the plaintiff ſhould produce the ſaid tithe-table; and on reading the depoſitions of *Joſeph Chritchley*, and *Ellen* and *William Currey*, examined for the plaintiff, on the commiſſion for the examination of witneſſes, as to the contents and uſage of the ſaid pariſh tithe-table, the cauſe was ordered accordingly to be reheard, and the ſaid table to be produced by the plaintiff on ſuch rehearing.

The cauſe was accordingly reheard before the honourable barons of the *Exchequer*; and on ſuch rehearing, the plaintiff produced, and read, the ſame written and oral evidence as he had read on the original hearing; and, in addition, read copies of two terriers, taken from the originals in the epiſcopal regiſtry at *Cheſter*, dated reſpectively in 1696, and 1709; but neither of which appeared to have been ever read, or reſorted to, for collecting the vicar's dues.

The defendants read in evidence, on ſuch rehearing, in addition to the former evidence, the ſaid table of the vicar's due, and the depoſitions, as to the ſame, ſet forth in the appendix.

On 1 *July*, 1777, the ſaid cauſe was reheard, and the court of *Exchequer* was pleaſed to order and decree, that the ſaid decretal order, bearing date 18 *December*, 1775, ſhould be affirmed.

See the original cauſe, under Michaelmas *Term*, 16 Geo. III. *and on appeal, under* Hilary *Term*, 19 Geo. III. *with the* APPENDIXES *ſubjoined thereto.*

Michaelmas Term, 18 Geo. III.

November 17, A. D. 1777.

In the *Exchequer*.

* Sir *John Skynner*, Lord Chief Baron,
Sir *James Eyre*,
Sir *Beaumount Hotham*,
Sir *Richard Perryn*,

Edward Thurlow, Attorney General.
Alexander Wedderburn, Solicitor General,
John Glynn, Serjeant at law, Recorder of *London*.

John Bosworth, Doctor in Divinity, Plaintiff.

Joseph Limbrick, the younger, *Joseph Cullimore*, and *John Stock*, Tenants of the Right Honourable *Thomas* Lord *Ducie*, } Defendants.

The case of the plaintiff, extracted from the respondent's, as stated in his printed appeal; delivered to the Lords, counsel and parties concerned, previous to the hearing, with the manuscript judgments of the House indorsed thereon.

THE plaintiff is rector of the parish of *Tortworth*, in the county of *Gloucester*, and as such filed his bill in the court of *Exchequer*, in *Trinity*

Rector is intitled unto the tenth morning's meal of milk, and unto the tenth evening's meal of milk, for his tithe of milk.

* The above is extracted from page 38 of "The *Nomenclature* of *Westminster-hall*," subjoined to "The Biographical History of Sir *William Blackstone*." Octavo edit. 1782.

Term,

Term, 13 *Geo.* III. againſt the defendants, and alſo againſt *John Stock*, another tenant of the ſaid *Thomas* Lord *Ducie*, thereby ſtating, that the plaintiff was, in the year 1768, preſented, inſtituted, and inducted, into the rectory of *Tortworth*, and had ever ſince continued rector, by means whereof he was intitled to the tithes of all titheable matters, as well great as ſmall, within the ſaid pariſh.

That the defendant *Limbrick* had, ever ſince 5 *April*, 1773, occupied lands in the ſaid pariſh, and kept thereon a conſiderable number of milch cows, which yielded great quantities of milk.

That the defendant *Cullimore* had, ever ſince 1 *January*, 1773, occupied lands in the ſaid pariſh, and kept ſeveral milch cows thereon, which alſo yielded great quantities of milk; that the defendant *Cullimore* mowed a cloſe called "*The Lagger*," in *Tortworth*, in 1772, and dug potatoes in the ſaid pariſh; and both the defendants had ſeveral other titheable matters during the time aforeſaid in the ſaid pariſh, the tithes of which were due to the plaintiff, but never ſet out for him.

That the defendant *Cullimore*, his wife, and three or more children, of the age of ſixteen years, and upwards, living with him, had reſided ever ſince 5 *May*, 1772, in the ſaid pariſh, and that there was due from them to plaintiff *Eaſter* offerings, at the rate of two-pence an head, for two years paſt.

The plaintiff charged by his bill, that he was intitled to, and ought to receive the whole milk milked on every tenth natural day, as well in the morning

ing as in the evening, as and for the tithe of the milk of the ſaid cows, for the whole nine preceding natural days, which the plaintiff ſubmitted to be the fair and equitable way of ſetting out tithe milk in kind; and he inſiſted, that if the tithes of the milk of the whole herd of cows was to be ſet out at every tenth milking only, the owner of ſuch cows would claim (contrary to natural juſtice) an option to ſet out the tithe, either at a morning's milking, or at an evening's milking, as he pleaſed, and would then ſet out the evening's milking for tithe, whereby the plaintiff would be much injured in *not** receiving his full tithe of milk; for that by the uſual way of milking cows, *the quantity and value of the milk of every cow milked in the afternoon or evening, was on an average one third leſs in quantity, and conſequently in value, than the milk milked from the ſame cows in the morning of the ſame day*, which was occaſioned partly by the great inequality of the times between milking, and partly by the cattle not feeding ſo much in the day as they do in the night, by reaſon of the heat of weather, flies, and other cauſes; and he conceived, as the law gave him (as rector) the full tenth, and not any thing leſs, than the tenth of the milk milked, an evening's meal, as and for the tithe, would be unfair, being ſo much leſs in quantity and value, than the full tenth of the milk of ſuch cows produced by the ten ſeveral milkings; and that therefore the only way for a perſon intitled to the tithe of milk, to receive a full tenth thereof, was, that the milk milked on the tenth natural day, in the morning and evening, ſhould be ſet out for the tithe of ſuch milk.

He charged, that the ſaid pariſh of *Tortworth* was a dairy pariſh, appropriated wholly to the keeping of

* *Not* is omitted in the original. *J. R.*

milk

milk cows, and making butter and cheeſe, there not being in the whole pariſh above three acres of arable land (except the glebe) inſomuch that *the tithe of milk is the beſt and moſt valuable* ſpecies *of tithe belonging to the ſaid rectory*; and as the whole tenth part of the milk, and not any thing leſs than the tenth, (with the tithes of the other titheable matters ariſing in the ſaid pariſh, which are, comparatively, but ſmall) was given to the rector for the maintenance of himſelf and family, he ſubmitted it to the court, *that the ſetting out for tithe, the milk milked on the evening of every fifth day only, would be prejudicial not only to the plaintiff, in diminiſhing the revenue of his rectory, but alſo to the patron thereof, by leſſening the value of the advowſon.*

And the plaintiff charged by his bill, that whenever the ſaid defendants had ſet out the tithe of any milk in kind, they had always ſet it out in an evening, and never in a morning, or on the tenth natural day, as they ought to have done; he alſo charged, that the computation of time, when the milk of every perſon's cows that have calved ſhould firſt begin to be titheable in each ſucceeding year, was, or ought to be, *from the time when the firſt cow, after calving, in any new year, was brought to the pail and milked*, the ſame being a new increaſe or renovation of the milk, and ſo, of every cow calving after ſuch before-mentioned cow, the tithe ought to be ſet out on the ſame natural day and time, as that of the firſt cow in each ſucceeding year was, or ought to be, when firſt brought to the pail and milked after calving; and that the ſaid defendants, tho' their herds of cows were in the fall of each year dry, and yielded little or no milk, yet, in order to *effectuate the deſign of making all the milch cows of the whole pariſh*

pariſh perpetually titheable on one and the ſame natural day in every year, they pretended throughout the year, on every tenth milking, to ſqueeze or preſs out a very ſmall quantity of milk out of the whole herd, and to ſet out the ſame as and for the tithe milk of ſuch cows; but the plaintiff inſiſted, that, in every ſucceeding year, the tithing day of milk ought to be computed from the time when the firſt cow, after calving, comes to the pail to be milked in each year, and that the tithing days of the whole herd of cows ought to be governed and calculated from the firſt day when ſuch firſt cow, after calving, in every year, comes to the pail to be milked, and not by the unfair practice of milking a few cows which are in effect dry, as being then big with calf, and never milked, unleſs for ſuch unfair purpoſes, in order to keep up a ſucceſſion of tithing days throughout the year, and to make the tithing day from year to year, to fall on one and the ſame natural day thoughout the pariſh, intending thereby to injure and diſtreſs the parſon, by conſtraining him to collect the tithes of the milk of the whole pariſh at one and the ſame milking.

That although the defendants pretended, that they had fully and duly ſet out the tenth meal of their whole herd of cows, as and for the tithe of milk, yet the plaintiff charged the contrary to be true, and that he was intitled to the tenth natural day's milk of all the ſaid cows, and not to the tenth evening's milk only; and that the evening's meals, which they pretended to ſet out, had been conſiderably leſs than they ought to have been, occaſioned by the unequal ſpace of time of milking in the morning and evening of thoſe days, when the tithe had been pretended to be ſet out; for that ſuch *ſpace of time between the morning and evening's milking was always longer on the days which*

which were no tithe days, than on thoſe days which were called tithe days, whereby a conſiderably leſs quantity than the full tenth of ſuch milk, had been ſet out as the tithe thereof, which plaintiff conceived he was not bound to accept; and he particularly charges, that the defendant *Limbrick*, on 10th *May* next before the filing the plaintiff's bill (being what he called a tithing day) began to milk his cows ſo late as ſeven in the morning, and in the afternoon of that day he began to milk, as and for the tithe meal, at three o'clock; and on 15 of ſame month, being what he called another tithing-day, he did not finiſh his morning's milking until between eight and nine of the morning of that day, and he began his evening's milking, which he pretended to ſet out for tithe, ſoon after three in the afternoon; and in like manner, and nearly about the ſame time, and for the ſame cauſe, his cows were milked on 20, 25, and 30 *May*, then enſuing, both in the morning and evening; and that in or near the like manner and ways, the defendant *Cullimore* had carried on his milking, and the tithing of his milch cows, from 19 *July*, 1772, being what he called a tithing-day, on which day he began to milk his cows, for what he called the evening's milking, before two o'clock in the afternoon of that day; and in like manner, and for the like cauſe, his cows were milked on 17 *September* laſt, being what he called a tithing-day, on which day he began to milk his cows, for what he called the evening's milking, before three o'clock in the afternoon of that day; and in like manner, and for the like cauſe, he milked his cows early in the afternoon of the other days in the bill mentioned, being what he called tithing days; and the plaintiff in his bill mentions ſeveral other inſtances, wherein both the ſaid defendants, on the days they called tithing-days, milked

milked their cows very late in the morning, and early in the afternoon, and not at the hours when they milked their cows on other days, which were not tithing days, by which mode of milking on tithing-days the plaintiff was greatly injured.

The plaintiff alſo charges by his ſaid bill, that the defendants have frequently put the *milk milked for tithe into unclean or unwholeſome veſſels*, and ſometimes had put *runnet* or other ingredients therein, to injure and ſpoil it; at other times had permitted *pigs* and *dogs* to drink up the ſame before the whole milking was over, and often permitted ſuch *pigs to get into the veſſels wherein ſuch milk was placed, and to wallow therein*; and alſo had encouraged and permitted ſeveral poor perſons to take and carry away ſaid tithe milk, before the cows were all fully milked, whereby the ſaid plaintiff was injured; and the ſaid plaintiff, in his bill, charges ſeveral inſtances, wherein ſuch practices had been committed.

The plaintiff charges, that in the ſaid pariſh of *Tortworth*, there is no ancient cuſtom reſpecting the mode of ſetting out the tithe of milk, and that he, in the ſaid year 1772 did take the tithe milk in the manner the ſaid defendants thought proper to ſet out the ſame, in order to prevent the ſame from being ſpoiled; but he finding the ſame to be much leſs in quantity than the fair full tenth part of the milk, refuſed to accept the ſame any longer than during the ſaid year 1772, of which he gave notice to the defendants.

The plaintiff alſo charges, that ſince 1 *January* 1773, the milk milked by the ſaid defendants, and pretended to be ſet out for tithe, had been frequently

thrown down, or ſpoiled by, or by the orders, and with the privity or conſent of the ſaid defendants, without giving plaintiff any previous notice of ſetting out ſaid tithe, which notice plaintiff charges they ought to have given.

That the plaintiff claimed the benefit of a road over three cloſes of ground, in the poſſeſſion of the defendant *Stock* (other part of Lord *Ducie*'s eſtate) in *Tortworth*, as appurtenant or belonging to defendant *Limbrick*'s ſaid lands, and uſed by the occupiers thereof, for the plaintiff to fetch and carry his tithes ariſing thereon to the rectory houſe in *Tortworth*; and ſtates how the uſual gate in one of *Stock*'s cloſes was lately taken down, and the gap made up, to prevent plaintiff fetching his tithes that way, whereby plaintiff, if he gathered his tithes ariſing on *Limbrick*'s lands, was neceſſitated to do it in a very circuitous manner, by a road one mile and an half further about than the way claimed (which is only one mile and ſix poles) and nearly the whole thereof, out of the pariſh of *Tortworth*, which plaintiff conceives to be unreaſonable.

And the plaintiff alſo charges by his ſaid bill, that as the tithe of milk in *Tortworth* was valuable, he is deſirous that the mode of tithing the ſame ſhould be ſettled by the court of *Exchequer*, and ſubmitted to accept the tithe thereof in the manner the other occupiers of land in the ſaid pariſh thought fit to ſet it out, in order that the ſame might not be waſted or ſpoiled, pending the ſuit, holding the ſame would not be deemed any prejudice to the right, which by his ſaid bill he ſeeks to eſtabliſh; wherefore as the ſaid defendants refuſe to accompt with the plaintiff or the value of the tithes before mentioned, the

the plaintiff prayed that the ſaid defendant might be decreed to account with the plaintiff for the ſingle value of the tithes, and that the ſaid defendant *Stock* might be decreed to open the ſaid gap, ſo made up by him, that the plaintiff might be enabled to bring home his ſaid tithes, through and along the fields in the bill mentioned, and for general relief was the bill.

The defendants put in their firſt anſwer to the plaintiff's bill, which was ſworn 14 *May*, 1774, and the defendant *Limbrick* therein ſaid, that ever ſince 5 *April*, 1773, he had occupied lands in *Tortworth*, and in the adjoining pariſh, as tenant to Lord *Ducie*, that thoſe in *Tortworth* were of the annual value of one hundred and twenty-ſix pounds, and that he kept on an average, *forty-ſix milch cows*, which yielded conſiderable quantities of milk.

The defendant *Cullimore* ſaid, that ever ſince 5 *April*, 1772, he occupied lands in *Tortworth*, and ſome other places; that thoſe in *Tortworth* were of the yearly value of one hundred and forty pounds, and on an average had kept *forty milch cows in Tortworth*, which yielded conſiderable quantities of milk.

That in *July*, 1771, he received notice from plaintiff, that from and after 5 *April* then next, the compoſition between them for tithes ſhould ceaſe, and that the plaintiff would expect to receive his tithes in kind, unleſs the defendant *Cullimore* would conſent to make ſuch a recompence for them as the plaintiff ſhould approve.

The defendant *Cullimore* ſaid that the plaintiff being very * exorbitant in his demands, he did not chuſe to compound with him, therefore gave notice in writing to plaintiff, that he ſhould ſet out the tithe of milk at his uſual milking place, in the afternoon of 10 *April*, then inſtant, at his uſual time of milking in the afternoon, and ſhould continue it in like manner after; that he accordingly, in the evening of that day, ſet out the tithe of his milk, being the tenth meal, computing the ſame from the night of 5 *April*, 1772, making the morning's meal of 6 *April* the firſt meal, from the time the former compoſition was by plaintiff's notice to ceaſe, and inſiſted, that the ſame was the regular and uſual mode of ſetting out tithe milk, it being by every tenth meal, and not of all the milk milked on the tenth natural day.

That having ſet out his tithe milk in the afternoon of ſaid 10 *April*, the plaintiff then ſent for and took away the ſame.

The defendant *Limbrick* ſaid, that he entered on ſaid lands in *Tortworth* on four ſeveral days, in his anſwer mentioned, and that his cows being brought on his ſaid lands in *Tortworth*, on the evening of 5 *May*, 1773, he then gave plaintiff notice in writ-

* The higheſt compoſition demanded by the plaintiff was three ſhillings in the pound, according to the rent, in lieu of all tithes, which was refuſed; plaintiff afterwards, in conference with Lord *Ducie*, hoping thereby to prevent litigation, voluntarily offered to accept *two ſhillings and ſix-pence in the pound for all tithes*; and in a ſubſequent treaty with Mr *Richard Hall*, the ſteward of Lord *Ducie*, the plaintiff conſented to accept of a ſum after the rate of *two ſhillings and four-pence in the pound, as a compoſition for all his tithes*; but theſe terms alſo were rejected by the lord and his tenant.

ing,

ing, that he had that evening brought on his ſaid lands in *Tortworth*, ten cows, and ſhould ſet out the tithe milk, which would be due to plaintiff, on *Monday* 10 *May*, in *Floodgate-mead*, and ſhould afterwards continue to ſet out ſaid tithe milk, as it ſhould become due, at the uſual milking place.

That in the afternoon of that day, he did ſet out the milk of his ſaid cows then milked, as and for tithe, the ſame being the tenth meal of milk next after his cows were brought into the ſaid pariſh.

Both the defendants admitted, that *Tortworth was a dairy pariſh*, and ſaid, they conſtantly, in the years 1772, and 1773, had ſet out the tenth meal of milk, ſuch meal being an evening's meal only; and they inſiſted, that the tithe of milk ſhould not be taken in the morning as well as evening of the tenth natural day, becauſe then the calves muſt on that day go without milk to feed them, and there would be no whey to give the pigs, which in dairy farms is almoſt the only thing to give them; that a calf, at ten days old, would drink more milk than one cow would give, and that they were generally kept ſeven weeks, if not more, for the butcher; and that the defendant *Cullimore*, who generally milked *forty cows in Tortworth*, had often ten or more calves tied up, feeding on the milk of his cows, in order to make them fat and ſaleable, and five or ſix calves at a time for weaning, each of which calves, before fit to ſell to the butcher, or to turn to grazing, would drink the milk of three cows, if the former had ſufficient to feed them with; and if the plaintiff ſhould take the tithe of all the cows on the tenth natural day, the fatting calves would leſſen in bulk and value more than they would gain in the four or

five following days, for that the farmer could not, on the day preceding ſuch tenth day, ſave milk ſufficient to feed his calves, nor whey ſufficient for his pigs, nor would the milk milked in the evening of the ninth day, remain in ſummer ſweet and wholſome till the evening of the tenth day, if the whole milk of that day ſhould be ſet out for tithe.

That calves intended for the butcher, and fed with new milk, would not feed on ſkimmed milk, or on any other than milk newly milked, and that milk ſuffered to ſtand without being moved, would have the cream riſe on the top thereof, which would not afterwards incorporate together, in conſequence whereof, calves intended for the butcher, muſt go without nouriſhment on the tenth natural day, unleſs any other food, as good as milk on which calves would feed, could be ſubſtituted in the place thereof; they ſaid, they apprehended the rector was intitled to the tithe of milk as long as the cows gave any, and that it was uſual, in all dairy farms, to milk their cows, as long as they gave any milk, all the year round; and that, as the rector was intitled to every tenth meal, they had duly ſet the ſame out, and that ſuch milking their cows all the year round, could not be to prejudice the plaintiff, becauſe it was always uſual ſo to do, and the cows were thereby the better, their udders by frequent milking being diſtended, and thereby capable of holding larger quantities of milk, and ſuch milking was neceſſary alſo, on account of the cows calving at different times of the year; thoſe which calve in the ſummer giving milk all the winter; and in large dairy farms, the cows calve in almoſt every month of the year, ſo that if cows were not to be milked in the winter, as the plaintiff pretended, the defendants muſt neceſſarily ſuffer great loſs.

2 They

They ſaid, that at the uſual time after the calving, when each cow came to the pail, they had regularly, on the next tithing milk day, ſet out the milk of ſuch cows, with that of others which had before been in milking, which was giving the rector a conſiderable advantage, and they inſiſted, that the legal mode of tithing milk was, by ſetting out every tenth meal of the whole herd, and not by ſetting out the tenth meal of every cow, computed from the time of it's firſt coming to the pail.

They denied that they pretended that the plaintiff was intitled to the tenth evening's meal only, and no other, for his tithe, but ſaid he was intitled to the tenth meal, whether it happened to be in the morning or evening; and they both ſaid, that they had ſeverally ſet out, on every fifth day, the tenth meal of their whole reſpective herds, they denied that, in order to prejudice the plaintiff, they had uſed any unfair practice to leſſen the quantity or value of his tithes, or that on tithing days they had milked later in the morning and ſooner in the evening, than was uſual on other days, or that they ever gave any orders to their ſervants for any ſuch purpoſe; for that, on the contrary, their orders to their ſervants always were, to uſe no unfair dealings whatever to prejudice the plaintiff, and proceeded in ſtating the particular hours in the morning and evening, in the ſeveral various ſeaſons in the year, when they began their ſeveral milkings; *viz.*

	Morning.	Afternoon
From *Chriſtmas* to *Candlemas*, milked at —— ——	8	
From *Candlemas* to 5 *April*, milked at	6	At half after two all the year.
From 5 *April* to 14 *May*, milked at	5	

	Morning.	Afternoon.
From 14 *May* to latter end of *Auguſt*, milked at half after ——	4	
From *September* to *Michaelmas*, milked at —— ——	5	At half after two all the year.
From *Michaelmas* to *Chriſtmas*, milked at —— ——	7	

and ſaid, they never varied therefrom above half an hour, unleſs in the caſe of young heifers, on their firſt coming to the pail, and in caſe of cows being diſordered by the cow-pox, which are then difficult to milk.

OBSERVATIONS.

Space between the evening and morning milking.	Space between the morning and evening milking.
17½ Hours.	6½ Hours.
15½ Ditto.	8½ Ditto.
14½ Ditto.	9½ Ditto.
13½ Ditto.	10½ Ditto.
14½ Ditto.	9½ Ditto.
16½ Ditto.	7½ Ditto.
92 total.	52 total.

Theſe totals ſhew the diſparity of the intervals between the times of milking (in which intervals the milk is generating) to be in the proportion of 92 to 52.

They ſaid, that the veſſels and pails into which the tithe milk had been put, had been always previouſly ſcowred and cleanſed, as uſual at other times of milking; and that they never ſuffered their dogs or pigs to drink the tithe milk, or to get into or wallow in the milk-tubs, as was pretended by the bill, except that

that once, the defendant *Cullimore* ſaid, three or four of his pigs happened to drink part of the milk ſet out for tithe, and got their feet into the milking tub, unobſerved by his ſervants; but he did not know or believe, that his ſervants did put other milk into the ſame tub, which the pigs had drank out of.

The defendants both ſaid that the plaintiff having neglected to ſend for his tithe milk, they had on the next morning after thrown the ſame on the ground, in order to have the uſe of their tubs and pails; they ſaid they never ſuffered their dogs or pigs to drink the tithe milk, or gave any part thereof to their calves or lambs, or to their ſervants, or labourers, and admitted that the whole of their lands which they occupied in *Tortworth*, they held under Lord *Ducie*.

Exceptions being taken to this anſwer, the defendants put in a further anſwer, which ſecond anſwer was ſworn 13 *June*, 1775.

The defendant *Cullimore* ſaid, that after 1 *May* 1773 (to which time plaintiff had received his tithe milk) he had conſtantly ſet out his tithe milk in his own pails, and left it for plaintiff, but he neglecting to fetch it, defendant *Cullimore* at the next milking, and not before, cauſed ſaid milk to be thrown on the ground, that he might uſe his pails at ſuch next milking, and that having given notice, he inſiſted he was not obliged to give plaintiff notice of ſetting out each reſpective meal of tithe milk; and the defendant *Limbrick* ſaid in effect the ſame, ſince 5 *April* 1773, with reſpect to the tithe and milking of his cows.

Stock's anſwer ſet forth, that occupiers of farm houſe (now down) and ſaid lands in defendant's *Limbrick*'s occupation, and ſaid claimed road, were lands in their poſſeſſion; but ſaid defendant ſaith the occupiers never claimed any right in reſpect of any road acroſs ſaid lands, either for their conveniency of going a nearer way, or otherwiſe; and admits he took down the gate, and hedged up the gap, *to prevent* plaintiff going that way.

To which anſwer plaintiff replied, and a commiſſion iſſued for examining witneſſes, which, with a renewed commiſſion obtained by defendants, laſted nine weeks.

PROOFS *on the Part of the Plaintiff*

It was proved on the part of of the plaintiff,

That the defendants cows were milked an hour and an half later on mornings next immediately before tithe meals, than on other mornigs, to make th evening's tithe milk leſs.

That the defendant *Cullimore*'s ſervants were ordered by him, *not to riſe ſo early* on thoſe mornings the evenings of which were tithe evenings, to milk the cows, as on the other mornings, ſaying it was "THE DEVIL's DAY," and the ſervants ſaid they obeyed the orders.

That the defendant's cows were milked *earlier on the afternoon of a tithing day*, by an hour or thereabouts, than the afternoon of any *non-tithing day*, to make tithe meal leſs.

That orders were given by defendant *Cullimore* to his ſervants *not to milk the cow dry on a tithing evening*, who

who in reply to a ſervant's remonſtrance, ſaid "*damn the parſon, you may get up earlier and milk them drier to-morrow morning*," and that the ſervants obeyed his orders.

That the defendant *Limbrick*'s cows were on tithe evenings milked unfair, being not milked dry, a conſiderable quantity of milk being left in their udders.

That the tithe milk of defendant *Limbrick*'s cows was *ſet out in various places, different from the places where milked, or from where the other nine parts were milked.*

That in like manner and places the tithe meals of defendant *Cullimore*'s cows were milked and ſet out.

That *a chamber-pot of urine was emptied into the tithe milk of the defendant Cullimore*, and his wife patted the maid on the back, applauding her for doing it.

That *pigs dung was put* or found in the bottom of the tithe tub, when the tithe milk was therein, whereby the milk was ſpoiled.

That the defendant's *pigs got into and wallowed in tithe milk*, in the tithe tub, when milking.

That clean tithe milk was afterwards put into the ſaid fouled tub and milk, whereby the whole milking was ſpoiled.

That the defendant's *pigs frequently drank the tithe milk*, and ſometimes throwed it down before the milking ended.

That

That the defendant's *dogs frequently lapped the tithe milk.*

That *runnet or other matter was put into tithe milk*, whereby the milk, on ſeveral trials, was found to be all ſpoiled, and turned to curds and whey.

That a part of the *tithe milk*, by the orders of the defendant *Cullimore*, was often *hid after milking in a hedge*, in a field, and after night it was brought home and uſed in his houſe.

John Rawlings, of *Cold Aſton*, *Glouceſterſhire*, huſbandman; *William Rawlings*, of *Cold Aſton*, *Glouceſterſhire*, dairy farmer; *John Penny*, of *Caſtle Cary*, *Somerſetſhire*, gentleman; *Jonathan Davis*, of *Worceſterſhire*, huſbandman; *Stephen Dark*, of *Broughton Gifford*, *Wilts*, dairy farmer; *John Hart*, of *Wotton Underege*, *Glouceſterſhire*, ditto; *William Lennet*, of *Mangots field* ditto, ditto, farmer; and *Rebecca Lennet*; *John Gay*, of ditto, ditto, ditto; *John Ithell*, of *Yate*, ditto, huſbandman; *Jane Tallen*, of *Briſtol*, a ſervant to defendant *Cullimore*; the Reverend *Thomas Shellard*, rector of *Readcombe*, *Glouceſterſhire*; ſpeak to the uſage of milking and dairying in their ſeveral counties; ſay that it was unuſual in dairy farms to have calves dropping every month in the year; that they endeavour to have them drop between *Chriſtmas* and *Lady-day*; that the calves will then be of a proper age to go from the cows early in the ſpring, when the graſs appears; which they declared to be the beſt mode of dairying; not uſual in dairy farms to milk cows with calf, till within (ſome ſay) ſeven or eight, others eight or nine weeks of calving; if milked after thoſe times, they ſay it is hurtful to the cow and calf;

calf; practicable to ſet out the tenth natural day's milk, both mornings and evenings for tithe; and that the farmers ſtock may be ſupplied from the preceding milk of the tenth natural day; ſay the *morning's meal*, is, on an average, through the year, ONE THIRD MORE than *the evening's meal* of milk of the ſame cow.

Robert Clarke proves, that he made the following experiments of the ſeveral quantities of milk milked in the mornings and evenings, from farmer *Pagler's* dairy cows, in the famous cheeſe pariſh of *Berkeley* in the county of *Glouceſter*, which adjoins to the pariſh of *Tortworth*, on the following ſeveral days, *viz.*

The Difference between a Morning and Evening Meal, proved from actual Measurement.

		The hours of milking in the morning.	The hours of milking in the evening.	The Produce. G.	Q.	P.
18 *Oct.* 1774.	Twelve cows milked in morn at	6	—	10	2	1
	Ditto in evening at	—	5	7	0	1
19	Same twelve cows milked in morn. at	6	—	10	2	1
	Ditto in evening at	—	4	7	0	1
20	Same twelve cows milked in morn. at	6	—	10	3	1
	Ditto in evening at	—	4	6	3	1
16 *Feb.* 1775.	Four cows only in milking milked at	6	—	4	3	0
	Ditto in evening at	—	4	3	0	1
17	Same four cows milked in morn. at	6	—	4	3	0½
	Ditto in evening at	—	4	3	0	0½
18	Same four cows milked in morn. at	6	—	4	2	1
	Ditto in evening at	—	4	3	0	0
22 *May*	Twenty-one cows milked in morn. at	5	—	34	3	0
	Ditto in evening at	—	3	25	0	0
23	Same twenty-one cows milked in morn. at	5	—	30	2	0
	Ditto in evening at	—	3	25	0	0
24	Same twenty-one cows milked in morn. at	5	—	33	2	0
	Ditto in evening at	—	3	25	0	1
23 *Oct.*	Twelve cows milked in morn. at	7	—	11	2	1
	Ditto in evening at	—	2	7	0	1
24	Same twelve cows milked in morn. at	½ after 7	—	12	0	0
	Ditto in evening at	—	½ after 2	7	0	1
25	Same twelve cows milked in morn. at	7	—	10	3	1
	Ditto in evening at	—	2	6	3	0½

There is proof in the cauſe, that the former occupiers of defendant *Limbrick*'s lands, always uſed the claimed road, when the lands in *Stock*'s occupation were not in their poſſeſſion; that plaintiff's predeceſſors (as old people dead had declared) uſed the claimed road to gather his tithes from defendant *Limbrick*'s lands; and that gate was taken down and gap made up by Lord *Ducie*'s orders to prevent plaintiff fetching his tithes that way.

Thomas Morgan, Lord *Ducie*'s ſteward, ſays that he entered into an engagement with Lord *Ducie* to *adviſe* and aſſiſt his tenants in *Tortworth in ſetting out their tithes*, no tithes having been ſet out for fifty-five years preceding, for which he was to have *an annual recompence*, and was ordered by Lord *Ducie* to give his tenants ſtrict charge to play no trick whatſoever, but to ſet out the full tithes, ſaying, that ſo long as his tenants did what was right, *he would ſtand by them*; that the defendant *Cullimore*, and eight other farmers in *Tortworth*, *did, by the advice of Morgan*, on 21 *April* 1772, cauſe a notice in writing to be delivered to the plaintiff, that they would ſet out their tithe milk in future on every fifth day in the afternoon, and that the next tithe meal would be ſet out on 25 *April* then inſtant in the afternoon; that this notice he ſaid was ſigned by defendant *Cullimore*, and alſo by *Thomas Daniells*, *John Bell*, *Thomas Weeks*, *Daniel Jennings*, *John Olive*, *Charles Long*, *John Hall*, and by the defendant *Stock*, in his preſence, all of whom, he ſaid, were tenants to Lord *Ducie*, of lands in *Tortworth*.

Richard Hall, late ſteward to Lord *Ducie* ſaid, that he received orders from Lord *Ducie*, to acquaint his tenants in *Tortworth*, that in caſe any ſuit ſhould

ſhould be brought againſt them by plaintiff, relating to the tithes, that he LORD DUCIE *would hear them harmleſs, and pay the expence of it*, and that he acquainted the tenants thereof; and *William Hill* Lord *Ducie*'s now ſteward, ſaid, in effect, the ſame, and he and *Thomas Morgan* both ſaid, that they *have, for and on the behalf of Lord* DUCIE, *paid monies on account of this cauſe*; that very near the whole of the pariſh of *Tortworth* is Lord *Ducie*'s.

This cauſe came on to be heard before all the barons of the *Exchequer*, 27 *June* 1777, and continued in hearing five days, when the court ordered it to ſtand over to *Michaelmas* term following, for conſideration; and on 17 *November* 1777, the court unanimouſly pronounced their decree, diſmiſſing the bill with reſpect to the claimed road, declaring the remedy to be a legal, and not an equitable one, and decreeing the plaintiff to be intitled to the ſeveral ſpecific titheable matters demanded by the bill, and with reſpect to the plaintiff's demand of *tithe milk*, the court declared, the plaintiff was *intitled unto the tenth morning's meal of milk, and unto the tenth evening's meal of milk*; and the ſaid defendants not having ſet out the ſame accordingly, it was thereupon further ordered and decreed by the court; "That the ſaid defendants ſhould ſeverally come to an account before the deputy remembrancer, for what was due from them to the plaintiff, *for* the value of *every tenth morning's meal, and of every tenth evening's meal of milk*, milked by the ſaid defendants reſpectively, within the ſaid pariſh of *Tortworth*, from the time in the bill mentioned; and that they ſhould reſpectively ſatisfy and pay unto the ſaid plaintiff, what, on ſuch laſt mentioned accompts, ſhould be found to be due from them unto the plaintiff, together with his the plaintiff's coſts

this

this ſuit, until that time in reſpect thereof, to be taxed by the deputy remembrancer of the ſaid court," and declared that the mode of computing the tenth meal was to number the mornings and evenings meals ſeparately, and apart from each other, and to count to the tenth of ten ſeveral ſucceſſive mornings, and the tenth of ten ſeveral ſucceſſive evenings, diſtinct from the mornings; ſo that whether the tithe ſhould be ſet out by the tenth morning and evening, or by the tenth evening and morning, was and will be accidental, according to the farmer's firſt milking on morning or on evening.

Remark of the Court.

In delivering the above judgment, the court declared, that the *hiſtory and complexion of this cauſe*, might be collected from the evidence of *Thomas Morgan, a noble lord's bailiff*, who had told them, that he had entered into engagements *to adviſe* the tenants in the pariſh of *Tortworth*, and *to aſſiſt* them in ſetting out their tithes there, no tithes having been ſet out in that pariſh for *fifty-five years* preceding.

That under *his directions*, on 21 *April* 1772, the defendant *Cullimore and eight* others delivered the above notice to the plaintiff, for ſetting out their tithe milk every *fifth day* in the *afternoon*; that the milk was accordingly ſet out every fifth day in the afternoon; now the purpoſe of ſetting out the tithe of ſo *many* different perſons in *one* and the *ſame evening or time*, the court declared was too obvious for them to be miſtaken in; that Mr. *Morgan* had gravely told them, he was ordered to charge the tenants to play NO TRICKS; but his taking advantage of what he underſtood to be the *letter of the law*, to INJURE the parſon materially in his right, as well

as

as to DISTRESS him as much as poſſible in the exerciſe of that right, the court declared was a PLAIN TRICK, diſgraceful to the adviſer of it, and reflecting no honour upon any of the parties concerned in or conſenting to it.

The Caſe of the Defendant, extracted from his Caſe as Appellant in the Lords.

The plaintiff is the rector of the rectory of *Tortworth* in the county of *Glouceſter*, and as ſuch intitled to the tithes thereof, particularly to the tithe of milk in kind within the ſame rectory.

The defendants are occupiers of certain farms and lands within the ſame rectory of *Tortworth*, and are as ſuch liable to the payment of the tithe of milk in kind to the plaintiff.

The plaintiff, for ſome time previous and down to the end of *July* 1771, accepted a compoſition from the defendant *Joſeph Cullimore*, in lieu of tithe of milk in kind, and on 20 *July*, 1771, gave notice in writing to the defendant *Cullimore*, that he the plaintiff ſhould on 5 *April* then next, ceaſe and diſcontinue to compound for his tithes on the then preſent terms, and that from and after that day he ſhould expect to receive his tithes in kind as preſcribed by law, unleſs the defendant *Cullimore* ſhould conſent to make him, the plaintiff, ſuch recompence for them, as he the plaintiff ſhould approve.

The plaintiff's demands for the tithe of milk were ſo high, that the defendant *Cullimore* could not compound any longer for the ſame, and therefore, on 9 *April* 1772, the defendant *Cullimore* gave notice to the

the plaintiff in writing, that conformable to the plaintiff's ſaid notice of 20 *July* 1771, he the defendant *Cullimore* ſhould ſet out the tithe milk due to the plaintiff from him, at his uſual milking place, or places, in the afternoon of 10 *April*, the then next day, at his uſual time of milking; and that the ſame would in like manner be continued to be ſet out as it became due.

The defendant *Cullimore* did according to his ſaid notice, in the afternoon of the ſaid 10 *April* 1772, ſet out the tithe of milk then milked from his cows, being the tenth meal of milk of his ſaid cows, computing the ſame from the night of 5 *April* 1772, being the day which the plaintiff, by his ſaid notice had fixed on for the determining of his compoſition, and making the meal of milk in the morning of 6 *April*, the firſt meal, and which was, as defendant *Cullimore* apprehended, the regular, legal, and uſual method of ſetting out and taking tithe milk, and the defendant *Cullimore* having in ſuch manner ſet out the tithe of milk, the plaintiff ſent for and took ſame away.

On 14th *April* 1772, the plaintiff thought fit to ſerve the defendant *Cullimore* with another notice in writing, informing him, that as the laſt tithe meal of milk ſet out by him was in the evening, the plaintiff thought himſelf intitled to have the next tithe meal ſet out in the morning, and therefore deſired that the next tithe meal of milk, which might become due to him from the defendant, might be ſet out in the morning after it became due, and from thenceforth to ſet out the future tithe meals of milk in an evening and in a morning alternately.

The defendant *Cullimore* being adviſed, that it was right and cuſtomary to ſet out the tithe of milk by every tenth meal, and not in the manner as demanded by the plaintiff, according to his laſt notice, he, on 21 *April* 1772, gave notice to the plaintiff in writing, that he ſhould ſet out his tithe milk every fifth day in the afternoon, and the next tithe meal of milk would be due on 25 *April* 1772, which ſhould be then duly ſet out; and the defendant *Cullimore* did accordingly ſet out his tithe of milk by every tenth meal, computing the ſame from the time aforeſaid, and continued to adhere to ſuch mode of ſetting it out.

The defendant *Limbrick* entered upon a certain farm and lands within the rectory of *Tortworth* about 5 *May* 1773, the ſame having been occupied by a tenant to whom the ſaid plaintiff had given the like notice for ceaſing his compoſition as to tithes, as is before ſtated to have been given to the defendant *Cullimore*; and the cows of the defendant *Limbrick* being brought on ſuch lands in the evening of the ſame 5 *May*, he immediately gave notice to the plaintiff that he had that evening brought his cows on the ſaid lands in *Tortworth*, and ſhould therefore ſet out the tithe of milk which would become due to the plaintiff on 10 *May* in *Floodgate mead*, and ſhould afterwards continue to ſet out his tithe milk, as it ſhould become due, at the uſual milking place; and accordingly the defendant *Limbrick* did ſet out the milk milked from his cows in the afternoon of ſaid 10 *May*, as and for the tithe due to the plaintiff, the meal of the evening being the tenth meal of milk milked from his cows next after they were brought into *Tortworth* rectory; but the plaintiff objecting to ſuch mode of ſetting out tithe milk, refuſed to take the ſame away, and

In *Trinity* Term 1773, the plaintiff filed his bill of complaint in the court of *Exchequer* at *Weſtminſter*; againſt the defendants, and which was afterwards amended by making the ſaid *John Stock* a party, for an account of various titheable matters, but chiefly for tithe of milk, alledging the defendants had not accompted with him for the ſame, and inſiſting, that he was intitled to and ought to receive the whole of the milk that was milked from the defendants whole herd of cows on each tenth natural day, as well in the morning as in the evening, as and for the tenth or tithe of the milk for the whole ſix preceding natural days; and that ſuch was the mode in which the defendants were obliged to ſet out their tithes of milk for the plaintiff, and which the defendants not having done or complied with, the plaintiff by his ſaid bill prayed that the defendants might be decreed to account with him for the ſingle value of the tithes in the ſaid bill mentioned, and for general relief.

To which bill the defendants put in two joint anſwers, thereby ſetting forth, that they had duly ſet out the tenth meal of milk of the whole herd of their cows, milked at one time, to the time of the plaintiff's filing his ſaid bill, and that the ſame had been fairly ſet out for the plaintiff, at the defendant's uſual places of milking in their pails, and that the ſame had been conſtantly left there for the plaintiff until the next milking meal, at which time the defendants wanting the uſe of their pails, were obliged to throw down the milk therein neglected to be ſent for by the ſaid plaintiff, which by law the defendants were adviſed he ought to have done; and the defendants ſaid by their anſwer, that *Tertworth* was a dairy pariſh, and inſiſted, that the tithe of milk could not

be taken both in the morning and in the evening of the tenth natural day, becauſe in that caſe calves muſt, on that day, go without milk to feed them, and there would be no whey to give the pigs, which in dairy farms was almoſt the only thing to give them; that a calf at ten days old would drink more milk than one cow could give, and that they were generally kept ſeven weeks, if not more, for the butcher, and that the defendant *Cullimore*, who generally milked forty cows in *Tortworth*, had often ten or more calves tied up feeding on the milk of his cows, in order to make them fat and ſaleable, and five or ſix calves at a time for weaning, each of which calves, before fit to ſell to the butcher or to turn to grazing, would drink the milk of three cows, and that if the plaintiff ſhould take the tithe of all the cows on the tenth natural day, the fatting calves would leſſen in bulk and value, more than they would gain in the four or five following days, for that the farmer could not on the day preceding ſuch tenth day ſave milk ſufficient to feed his calves, nor whey ſufficient for his pigs, nor would the milk milked in the evening of the ninth day remain in ſummer ſweet and wholeſome till the evening of the tenth day, and that it was well known that the calves intended for the butcher, and fed with new milk, would not feed on ſkimmed milk, or any other than milk newly milked from the cow, and that milk ſuffered to ſtand without being moved will have the cream riſe on the top thereof, which will not afterwards incorporate together, in conſequence whereof calves intended for the butcher muſt go without nouriſhment on the tenth natural day, unleſs ſome other food as good as milk on which calves would feed could be ſubſtituted in the place thereof, which is impoſſible; and the defendants in their anſwer likewiſe

wiſe inſiſted, that the legal *modus* of tithing milk was by ſetting out every tenth meal of the whole herd, and not by ſetting out the tenth meal of every cow, computed from the time of its firſt coming to the pail, and the defendants denied that they pretended the plaintiff was intitled to the tenth evening meal only, and no other, for his tithe; but ſaid the plaintiff was intitled to the tenth meal, whether it happened to be in the morning or evening; and the defendants ſaid, they had ſet out every fifth day the tenth meal of their whole reſpective herds.

To which ſaid anſwer of the defendants, as well as the anſwer of the defendant *Stock*, the plaintiff having replied, the defendants rejoined, and the cauſe being at iſſue, a great number of witneſſes were examined, as well on the part of the plaintiff as of the defendants, and the defendants (as they are adviſed) fully eſtabliſhed by their evidence, that they had legally, and according to the cuſtom of the country, fairly ſet out the tithe of milk, being the tenth meal of milk, as inſiſted on by their anſwer to the plaintiff's bill, and did in all other reſpects fully and ſufficiently prove their caſe as ſtated and relied upon by their ſaid anſwer reſpecting tithe milk.

This cauſe came on to be heard before the barons of his Majeſty's court of *Exchequer* at *Weſtminſter*, in the month of *July*, 1777, when the court took time to make their decree in the ſaid cauſe, and afterwards on 17 *November*, 1777, the court was pleaſed to diſmiſs the plaintiff's bill with coſts, as againſt the defendant *John Stock*; and as to the claim of tithe milk made by the plaintiff againſt the defendants, the court decreed, "That the plaintiff was intitled to the tenth morning's meal of milk,

and unto the tenth evening's meal of milk"; and the defendants not having ſet out the ſame accordingly, it was thereupon further ordered and decreed, "That the defendants ſhould ſeverally accompt for what was due from them to the plaintiff, for the value of every tenth morning's meal, and every tenth evening's meal of milk, milked by the *defendants* reſpectively, within the ſaid pariſh of *Tortworth*, from the time in the plaintiff's bill mentioned, and ſhould pay to the plaintiff what ſhould be found to be due from them on taking ſuch accompt, together with the plaintiff's coſts of ſuit until that time, *in* reſpect thereof, to be taxed."

The * Decree *of the Barons of the* Exchequer, *delivered by Sir* James † Eyre, November 17, A. D. 1777,

THE bill which was filed in the court of *Exchequer* by the Rev. Dr. *Boſworth*, rector of *Tortworth*, in *Glouceſterſhire*, complained that he had

* The above decree is taken from an *octavo* pamphlet, of only ſixteen pages, very largely and looſely printed, with the following title, "The decree of the Barons of the *Exchequer*, delivered by Sir *James Eyre*, *November* 17, 1777, in the great cauſe of TITHE MILK, between the reverend Dr. *Boſworth*, *Limbrick*, and others, as taken in ſhort hand by Mr. *Gurney*; with an appendix from the ſame decree, reſpecting the payment of AGISTMENT tithes for cattle, kept in one pariſh, and uſed in another; and the manner of tithing potatoes, and apples; to which is added the form of a notice proper to be delivered to the payers of tithe milk in kind. *Sherborne*, printed by *R. Goadby*, and Co. and ſold by *R. Baldwin*, *Pater-noſter-row*, *London*, MDCCLXXIX." This advertiſement is indorſed on the title page: "The following important determination of the court of *Exchequer* is publiſhed in the hope, that it may be equally ſerviceable to the clergy and laity."

† See the "*Nomenclature* of *Weſtminſter-hall*," ſubjoined to the "Biographical Hiſtory of Sir *William Blackſtone*," *octavo* edit. 1782. *J. R.*

been

been defrauded of one third of his tithe milk by the ſetting forth the tithe on an evening, and never on a morning; under a plea that the tenth meal was aſſigned the parſon by law; on which the court obſerved, that "The defendants profeſs that they have "duly ſet out to the plaintiff, for his tithe, every "fifth evening's meal; which, *they ſay*, is the tenth "meal to which the parſon is intitled. They having brought their cows to the pail in the morning, and beginning to count from the morning "of that day to the evening, and ſo on, the fifth "evening's meal of milk makes the tenth meal, "which is the parſon's due.

"The plaintiff contends, that the ſetting out "every fifth evening's meal is not the due mode of "tithing: and the argument for the plaintiff aſſumes "one fact; which is, that the produce of the "evening's meal, from phyſical as well as other "cauſes, muſt always be *leſs in quantity* than the "morning's meal. And the witneſſes on both ſides "agree, that the fact is ſo, though they differ a "great deal as to the proportion.

"One of the plaintiff's witneſſes made a great "number of experiments, in order to aſcertain the "proportion in which the evening's meal fell ſhort; "and it appeared, upon the reſult of theſe experiments, that it *frequently* fell ſhort a third, but "*never* leſs than a fourth part of the morning's. "It therefore follows, as a neceſſary conſequence, "that a fifth evening's meal conſtantly ſet out to "the parſon, muſt produce him leſs, upon the "whole, than a tenth part of the milk.

"This being the fact, the argument proceeds "thus: the tithe of milk (as of all other titheable

" matters) belonging *de jure* to the parſon, is the " tenth part of the milk produced. A rule of " tithing, therefore, which *neceſſarily* gives to the " parſon leſs than the tenth, cannot be the true " rule.

" This was the ſum of the argument urged for " the plaintiff. It was admitted, that it had been " thus far ſettled, by the *few* caſes that are to be " found on the ſubject of tithe milk, that *neither the* " *tenth part of every cow's milk at every meal, nor the* " *tenth part of the whole meal, were to be ſet out to the* " *parſon*, and that *the tenth meal was the tithe to be* " *ſet out*. But for the plaintiff they inſiſted, that " the tenth meal muſt not be ſo computed as *neceſ-* " *ſarily* to produce leſs than a tenth part of the " whole ten meals taken together.

" The plaintiff's counſel endeavoured to point " out a manner of taking the tenth meal, which " would not be liable to this objection. They ſug- " geſted taking *a morning and evening's meal alter-* " *nately*, or taking *the whole meal of the tenth day*.

" The defendant's counſel ſay, that in the caſe " of taking it the whole day, it would be taking " the nineteenth and twentieth meals, inſtead " of every tenth; and in the other caſe, that " it would be taking ſometimes the ninth, and " ſometimes the eleventh meal; and therefore, that " in either caſe, it would be departing from the " rule laid down, which is, that *the parſon is in-* " *titled to the tenth meal*. This they inſiſt is now to " be taken as a clear rule of law; ſettled by the " authority of ſeveral determinations, and become " an eſtabliſhed rule of property.

" Upon

" Upon general principles, we find it difficult to " perſuade ourſelves that that can be a true rule of " tithing, which puts it in the power of the farmer " to give the parſon, perhaps, a twelfth, a thirteenth, " or a fourteeth, inſtead of a tenth. A preſcrip- " tion to pay leſs than a tenth, we all know, " would be a void preſcription, unleſs it was aſſiſted " by ſome conſideration to make the parſon amends " for the difference between the tenth and that leſs, " which the preſcription propoſed to give him. " When the tenth meal was declared to be the right " of the parſon, it was certainly ſubſtituted in the " place of the tenth quart, or the tenth diſh, or the " tenth part of each meal: it was not meant to give " leſs than the tenth, but the object was to give the " tenth in a more convenient and more uſeful form. " It was therefore auxiliary to the general right of " a tenth: it was intended to fortify and not to " deſtroy that right. If, in experience, it turns " out to be ſo unhappily framed, as to be capable " of being made to operate in deſtruction of a " right (as it certainly would do in the ſenſe in " which it is underſtood by the defendants), it " ſhould ſeem that, notwithſtanding the authority " of caſes, the right would be ſuppoſed, and the " rule condemned, as not warranted by the law of " *England*, and as being fundamentally erroneous " in the original conception of it; and the over- " turning ſuch caſes would be no great ſtretch of " authority; in truth, it would be *reſtoring*, not " *altering*, the law.

Preſcription to pay leſs than tenth, void, unleſs, &c.

Tenth meal ſubſtituted in place of tenth quart, &c.

" But we are very ready to admit, that we ought " not haſtily to condemn a rule laid down upon " great debate, and conſideration of ſeveral differ- " ent modes of tithing, practiſed, at different times,

" in

" in different places. We ought rather to ſuſpect " that we have not underſtood the true ſenſe and " meaning of the rule. Unqueſtionably, if a con- " ſtruction can be put upon this rule of tithing, " which will preſerve the original ſpirit of it, it's " truth and it's juſtice; and put it out of the power " of any man to make it an inſtrument of wrong and " injuſtice, this court will ſtrongly incline to adopt " ſuch a conſtruction. And upon conſideration, " we think ſuch a conſtruction may be put.

" The morning and evening meals, being neceſ- " ſarily unequal in produce, may, and we think " ought to be, conſidered as diſtinct titheable mat- " ters, from each of which you may count on the " tenth, which will be the right of the parſon; " and that tenth will be the tenth meal *of that de-* " *ſcription to which it belongs*, either morning or " evening; and in this way the parſon will, upon " the whole, have his full tenth, as much as he " can have in the manner of collecting any other " *ſpecies* of tithes whatever; inſtead of neceſſarily " taking leſs than a tenth in the defendant's way " of ſetting out his tithes. And, in reſpect to " authority, upon a careful review of all the " * caſes we have been able to find upon this " ſubject; we not only do not find any ad- " judged caſes ſtanding in our way, but we collect " that the rule of the tenth meal was originally un- " derſtood in the ſenſe in which we think it ought " now to be underſtood.

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* The caſes quoted were: " *Weſt Tythery, Silverlock*, and *Eyles*. " *Chigwell, Dod*, and *Ingleton*. *Hill* and *Vaux*. Lord *Raymond*, 1ſt vol. " of Reports. *Barton, Elkins*, and *Brider*, 1703. *Brinklow* and *Ed-* " *monds*, 1731." See *poſt*. *J. R.*

" There

" There appears therefore to us nothing, in point " of argument or authority, which ſhould prevent " us from effecting the juſtice of the caſe between " theſe parties, by declaring that *the defendants* " *ought to have paid to the plaintiff the tenth morning's* " *meal, and the tenth evening's meal,* of this milk; " in which having failed, they will be decreed to " account.

" That we may be perfectly underſtood, I add, " that it is by accident that it happens in this par- " ticular caſe, that the tithe, which ought to have " been paid, would be the whole milk of one day.

" If the cows had been begun to be milked in " the evening, inſtead of the morning, the meal " would have been due in the evening, and in the " morning of the ſucceeding day; and that would " have been the Jewiſh day which we heard of in " this cauſe.

" The coſts in this part of the cauſe remain to be " conſidered. Hitherto we have choſen to conſider " this caſe very much in the abſtract, for the ſake of " the dry point; detached from every circumſtance " of fact, the ſingle fact of inequality in the morn- " ing's and evening's milk only excepted; upon " which the whole ariſes. But, upon the queſtion " of coſts, the hiſtory of the cauſe, and the gene- " ral complexion of it, becomes material. I think " both may be collected from the evidence of Mr. " *T—— M——*, who has told us, that he entered " into engagements with a noble lord, to adviſe his " tenants, and to aſſiſt them in ſetting out their " tithes, no tithes having been ſet out for fifty five " years preceding that under his directions, on the 21

" *April,*

" *April*, 1772; that the defendant *Cullimore*, and " eight others, delivered a notice in writing to the " plaintiff, that they would ſet out their tithe milk " every fifth day in the afternoon, and that the next " meal would be due on 25 *April* next; and the " milk was accordingly ſet out every fifth evening.

" The purpoſe of ſetting out the tithe in the " evening, and of ſo many different perſons ſetting " out their tithes on the ſame evening, is too obvi- " ous to be miſtaken. Mr. *M*——— gravely tells " us, that he was ordered to charge the tenants to " play no tricks. Taking advantage of what he " underſtood to be the letter of the law to injure " the parſon materially in his right, as well as to " diſtreſs him as much poſſible in the exerciſe of that " right, I ſuppoſe this gentleman thought was no " trick. But we are of opinion that this was a trick, " diſgraceful to the adviſer of it, and reflecting no " honour upon any one of the parties concerned in " or conſenting to it. Dr. *Boſworth* feeling himſelf " aggrieved by theſe manœuvres of Mr. *M*———, " has taken upon him to controvert Mr. *M*———'s " law, and he has ſucceeded under ſuch circum- " ſtances, that (though the point of law might " have been thought ſufficiently diſputable, *if it had* " *been fairly conteſted*, to have excuſed the party fail- " ing from paying the coſts of ſuit) we are of opi- " nion the coſts ought to follow the right.

" The defendants are therefore to account for the " tithe of milk, *with coſts*."

Dr. *Boſworth's* bill complained likewiſe, that the tythe of potatoes and apples was unfairly ſet out, the farmer leaving a tenth buſhel or ſack on the ſpot

ſpot where they aroſe for the parſon, and carrying home nine buſhels or ſacks only, *as he alledged*; and ſometimes carrying all home, and ſending to the parſon, ſome days after, for ſomebody to come and tithe them. On which the court obſerved, that "This is certainly no due ſetting out of this *ſpecies* "of tithes; for that the parſon has a right to in- "ſiſt, that *his tenth part ſhould be ſeparated from the* "*nine parts upon the ſpot where they ariſe, and before* "*they are removed* *.

Tenth part of potatoes or apples, ſhould be ſeparated from the nine parts, upon the ſpot where they ariſe, and before they are removed.

"The plaintiff profeſſes to have no view in pray- "ing an account of theſe *ſpecies* of tithes, but to "aſcertain the manner of tithing for the future; he "will therefore be content with the declaration that "the court decrees, that he is intitled to an ac- "count."

An account was alſo decreed for tithe hay left on the farmer's ground, he having driven the plaintiff's ſervants out of the field, on a pretence that they had no right to be there, but when his people were there alſo.

On which it was decreed, "That the parſon "may take away his tenth part as ſoon as ſet out, "if he pleaſes; or he may leave it a reaſonable "time †, (of which the law conſtitutes a jury the

Parſon may take away his tenth part as ſoon as ſet out, or leave it a reaſonable time, but at riſque of being ſtolen or injured, unleſs, &c.

* The reaſon for this equitable decifion ſeems to be, that the parſon, or his agent, may have time to view and compare the tenth with the other nine parts.

† If the tithes remain on a farmer's land longer than a reaſonable, the farmer cannot ſue till three days after he has given notice that the tithes are ſet out, and they continue unremoved; nor can he *legally* let his cattle go where the tithe is.

"judges),

" judges), but then it is at his own riſque, if ſtolen " or injured, unleſs the privity of the farmer be " proved; in which caſe they may be recovered of the farmer."

Cattle kept in parſon's pariſh, and uſed by pariſhioners in another pariſh, muſt pay *agiſtment* tithe.

Scoles and *Lowther*.

A queſtion likewiſe aroſe in this cauſe, whether cattle kept in the plaintiff's pariſh, and uſed by the defendant in another pariſh, ſhould pay *agiſtment* tithe: On which the court obſerved, that, " If it " were proper to determine this queſtion now, they " need only refer to the caſe of *Scoles* and *Lowther*, " which is in point, *that they ſhould pay* *: And the " reaſon is obvious; for the cattle being depaſtured " in the ſame pariſh where they work, the effect of " their labour is a ſatisfaction for the tithe of their " paſture; if they worked in another pariſh, there " could be no ſatisfaction, and the parſon muſt have " an agiſtment tithe, or he will have no tithe."

See this cauſe on appeal, under Hilary *Term*, 19 Geo. III.

* Firſt volume of Lord *Raymond*'s Reports, p. 129.

Michaelmas Term, 19 Geo. III.

December 5, A. D. 1778.

In *Chancery*.

Edward Lord *Thurlow*, Lord Chancellor.
Sir *Thomas Sewell*, Maſter of the Rolls.

The Rev. *James Davie*, Clerk, Vicar of the Pariſh Church of *Stanground*, with *Farcet*, in the County of *Huntingdon*, } Plaintiff.

The Right Honourable *Brownlow* Lord *Brownlow*; Impropriator of the Rectory of the ſame Church, *Thomas Mewburn*, *George Richardſon*, *Saunderſon Henrey*, *William Blackwell*, *Ralph Speechley*, the younger, *David Bowker*, *James Arnold*, and *John Kingſton*, (Occupiers of Lands and Tithes in *Farcet Fenn*, and of incloſed Fenn Lands in *Stanground*, as Tenants to the ſaid Defendant Lord *Brownlow*) and *William Chapman*, *Robert Johnſon*, and *Daniel Plummer*, (other Occupiers of Land in *Farcet Fenn*, as Tenants to Sir *Samſon Gideon*) and the Maſter, Fellows, and Scholars of *Emanuel College*, *Cambridge*, } Defendants.

The

The Caſe of the * *Plaintiff.*

THE plaintiff is vicar of the church of *Stanground*, with *Farcet*, in the county of *Huntingdon* (into which he was inducted in *July* 1766) and the defendant Lord *Brewlow* is impropriate rector of the ſame church.

The rectory impropriate of the ſame church was formerly part of the poſſeſſion of the abbey of *Thorney*, and by endowment of 11 *April*, 1402, the abbot and convent of the ſaid abbey, granted *to* the vicar of the ſaid church, all tithes, tenths, oblations, and offerings whatſoever, belonging to the ſaid church, except the tithe of corn, hay, wool, lambs, and calves.

At the time of the diſſolution of the ſaid abbey, the vicar, by virtue of a further endowment by the ſaid abbot and convent (ſuppoſed to have been made 22 *Hen.* VI.) was endowed with, and enjoyed a portion of one third of tithe corn, ariſing within the limits or hamlet of *Farcet*, which is a ſeparate vill, but parcel of the ſaid pariſh of *Stanground*.

Sir *Walter Mildmay*, Knight, Chancellor of the *Exchequer* (to whom Queen *Elizabeth* had then lately granted the impropriate rectory of *Stanground*) by indenture, dated 24 *October*, 30 *Eliz.* granted to the maſter, fellows, and ſcholars of *Emanuel College* in *Cambridge* (which Sir *Walter* had founded, and to which he gave the advowſon of the ſaid vicarage), and their ſucceſſors for ever, in truſt for the vicar of the ſaid pariſh, amongſt other things, " *All the*

* Taken from the reſpondent's caſe on appeal in this cauſe.

tithes of wool, lamb, and calf, arising within the parishes, towns, and hamlets of *Stanground* and *Farcet*, (except the tithes of wool, lamb, and calf, arising from the demesne lands and tenements of the manor of *Stanground*, then in the occupation of *Henry Parkinson*, or his assigns); and after taking notice that the vicar then had only one third part of the tithe corn in *Farcet* (the other two thirds thereof belonging to him the said Sir *Walter Mildmay*, as impropriator) he granted to the said master, fellows, and scholars, one fourth of his two third parts of the said tithe corn; so that the said vicar should from thenceforth have and enjoy *one full moiety of all the tithe corn arising in the said hamlet of* Farcet.

By a further indenture, dated 11 *April*, 31 *Eliz.* the said Sir *Walter Mildmay* conveyed to the master, fellows, and scholars of the said college, and their successors, in trust for the said vicar, the other moiety of the tithes of corn in *Farcet*.

By virtue of these several endowments and grants, the plaintiff, as vicar of the said church, became entitled to, and claims,

1. The tithe of corn, and all other tithes (except hay) throughout the hamlet of *Farcet*.

2. The tithe of wool, lambs, and calves, and all other the small tithes throughout the vill or township of *Stanground* (except the tithe of wool, lamb, and calf, of the manor farm or demesne of *Stanground*, called the *Burifted*, formerly occupied by *Henry Parkinson*, and his assigns).

Farcet, though united as a pariſh with *Stanground*, under one church, is, in all other reſpects, diſtinct from it, both as a manor and a townſhip; the town (which has a chapel of eaſe) is ſituate at the diſtance of upwards of a mile from that of *Stanground*; has a ſeparate pariſh, and civil officers, and the manor is, in all reſpects, diſtinct from and independent of that of *Stanground*.

The pariſh borders upon (and a large proportion of the lands belonging to the two townſhips extend into) the great level of the fenns called *Bedford Level*, which, till the improvements thereof, by drainage and incloſure in the reign of *Car.* I. and II. lay in a ſtate of inundation, during the greater part of the year, and wholly inproductive (except a *ſpecies* of coarſe graſs and hay, upon ſome particular ſpots), but in conſequence of the drainage, &c. became, and has ſince continued fit for culture, and produced corn, and other titheable matters.

Within the pariſh of *Stanground*, and adjacent to the townſhip and common field lands of *Farcet*, lies a large tract of fenn land, diſtinguiſhed and bounded as after mentioned, and containing, by eſtimation, three thouſand, three hundred, and ſixty acres, or thereabouts, anciently and ſtill known by the denomination of "*Farcet Fenn*," and reputed to be parcel of the manor and hamlet of *Farcet*, the remainder of the fenn lands within the pariſh lie within, and have been always conſidered as parcel of the townſhip of *Stanground*.

The tract called *Farcet Fenn*, is bounded as follows, *viz.*

Towards

Towards the north-weſt, by the common lands, in the vill of *Farcet*, from which it is divided by a river, called *Farcet Water*.

Towards the north, by lands in *Stangrounds*, called *Horſey Grounds*.

Towards the north-eaſt, by lands in *Whittleſey*, called *Whittleſey King's Delf*, from which it is divided by a dyke, called *Hockey* or *Oakey Dyke*.

Towards the ſouth-eaſt, by fenn lands in *Ramſey*, called *Middlemore*, from whence it is divided by a dyke, called *Small Dyke*.

Towards the ſouth, by the lake of water, called *Whittleſea Meer*; and

To the ſouth-weſt, upon lands in *Yaxley*, from which it is divided by a dyke or ſtream, called *Conqueſt Load*.

Anciently, and long before the general drainage of the fenns took place, certain parcels of land had been fenced off from the reſidue of *Farcet Fenn*, and held in ſeveralty for the purpoſe of mowing hay; the remainder (when not covered with water) as alſo the incloſed parcels after having been mowed, was uſed as an open common.

The largeſt of the meadows thus incloſed, which lay on the north-eaſt ſide next *Oakley Dyke*, and contained five hundred acres, was (and is ſtill) called *Farcet King's Delf*, and eight roods, and was ſubdivided into ſmall parcels (containing about four acres a-piece) called *Doles*, which was allotted

to, and held in ſeveralty by ſundry inhabitants of *Stanground* and *Farcet*, (probably) in reſpect of their rights of common in the fenn.

Another of the ſaid meadows, lying on the north-weſt ſide, and containing about thirty acres, was (and is ſtill) called *Milby*.

Another of the ſaid meadows, lying on the ſame ſide, and adjacent to the laſt, containing about forty acres, was (and is ſtill) called *New Mead*.

Sundry other ſmall parcels, incloſed in like manner, lying on the ſame ſide, were (and are now) called by the name of the *Pingles*.

At the ſouthern extremity of the fenn adjoining to *Wittleſey Mere*, a cottage called *Beale's Cote*, was anciently built, and ten acres of land were incloſed to, and have ever ſince been held in ſeveralty with it.

The abbot of *Thorney*, to whom both the manors of *Stanground* and *Farcet* belonged, held in ſeveralty (at the time of the diſſolution) another incloſed parcel, containing about one hundred and forty acres, (lying on the ſouth-weſt ſide of the fenn next *Conqueſt Lode*) called *Conqueſt Cloſe*, extending from *Fowle Lake*, in *Whittleſey Mere*, to *Farcet Water*.

The remainder of the fenn was, till the period after-mentioned, an open common, into which the tenants and inhabitants in ſundry neighbouring and ſome diſtant manors (which belonged to the ſame abbey) had a right by cuſtom of turning their commonable cattle, making a yearly acknowledgment for the ſame to the lords of the manor of *Farcet*.

In 10 *Eliz.* the ſaid Sir *Walter Mildmay*, to whom the manor of *Farcet* had been then granted in fee (and who was then leſſee of the crown for ſixty years of the manor of *Stanground*) came to an agreement with the commoners in the ſaid fenn, whereby he gave up his right of common and herbage therein, in conſideration of being permitted to incloſe and hold in ſeveralty to him and his heirs, four hundred acres of the ſaid fenn adjoining to the ſaid parcel (formerly incloſed by the abbot) called *Conqueſt Cloſe*, and ſuch four hundred acres were in conſequence of ſuch agreement incloſed, and have been ever ſince held in ſeveralty, with and as parcel of the manor of *Farcet*.

The remainder of the fenn lay open waſte, till the drainage of the fenns took place, in the reign of *Charles* the *Firſt*.

By the terms of their undertaking, the adventurers for the drainage were to have ninety-five thouſand acres (being the proportion of one third of the whole level) ſet out to them from all the lands common, and ſeveral within the level, and the ſame were allotted to them accordingly by a law of ſewers (ſince called the Saint *Ive*'s law) made on 12 *October*, * 30th *Car.* I. whereby nine hundred and forty acres, further part of the then common fenn of *Farcet*, ſituate on the ſouthern ſide next *Whittleſey Meer* and *Ramſey Fenn*, and one hundred and ſixty-two acres out of *Conqueſt Cloſe* and lands, three acres, one rood, ten perches, out of the lands belonging to *Beales Cote*, were ſet out, and afterwards incloſed, and held in ſeveralty, as the full proportion of the adventurers of the whole of *Farcet Fenn*, including the ſaid meadows of *King's Delf*, *Milby*, *New Mead*, and the *Pingles*, out of which no allotments were taken.

* *Sic orig.* J. R.

In the year 1682, the remainder of the ſaid fenn, which contained one thouſand, three hundred acres, was, by virtue of ſtatute 15 *Car.* II. *c.* 17. intituled, "An act for ſetting the drainage of the great level of the fenns called *Bedford Level*," divided and allotted to the ſeveral perſons having right of ſoil and common therein, in proportion to ſuch their reſpective rights, and afterwards incloſed and held in ſeveralty by them; and thirty-five acres were on that occaſion alloted to *William Brownlow*, Eſq; as lord of the manor of *Farcet*, and (as ſuch) owner of the ſoil of the ſaid fenn, in lieu of his ſeignory.

15 *Car.* II. c. 17.

Soon after the commencement of the drainage, when a proſpect opened of the fenn lands becoming productive, the right of tithes therein became an object of attention and diſpute, and the incloſed fenn lands in *Stanground* and *Farcet*, then held in ſeveralty, being firſt improved and rendered capable of yielding titheable matters, the vicar of *Stanground*, ſometime before the year 1640, aſſerted his claim to ſuch tithes of thoſe lands, as by his endowments and grants he was intitled to; the then impropriator, *Mildmay* Earl of *Weſtmoreland*, at firſt reſiſted the vicar's demand; but after a ſuit commenced by the vicar in the eccleſiaſtical court, entered into a compromiſe, and by agreement, made in the year 1640, conſented to allow him twenty-five pounds a year, in lieu of, and as a compoſition for the tithes of the ſaid incloſed fenn grounds, which payment hath been continued to be made by the ſucceeding impropriators to the ſucceſſive vicars, from that time down to *Lady-day*, 1773.

Sundry diſputes afterwards aroſe reſpecting the tithes of the *nine hundred and forty acres*, allotted to the

the adventurers, and the *one thouſand three hundred acres*, allotted to the commoners, as well between the impropriator and the owners, as between the impropriator and the vicar of *Stanground*, and ſeveral ſuits were commenced, and ſome of them brought to trial in conſequence thereof, but before any final deciſion of the right took place, theſe diſputes alſo terminated in the year 1688, *in a compromiſe* between the impropriator and vicar, the former conſenting to accept, and the latter to grant, a leaſe of ſuch tithes in the ſaid lands as the vicar was intitled to, at the rent of fifty pounds a year, which hath been continued to be regularly paid under that and ſubſequent leaſes by the ſucceeding impropriators, and accepted by the ſucceſſive vicars from thence to *Lady-day* 1773.

The firſt leaſe bears date 30 *May* 1688, and was granted by *Joſhua Ratcliff*, then vicar, to *William Brownlow*, Eſq; then impropriator, for the term of five years; a further leaſe dated 26 *May* 1691, on the ſame terms was granted by *Samuel Doughty*, clerk, then vicar, to the ſaid *William Brownlow*, for the term of five years; and a third leaſe bearing date 26 *May* 1751, was granted by *William Whitehead*, clerk, then vicar, to Sir *John Brownlow*, baronet, Lord Viſcount *Tyrconnel*, then impropriator, for fifteen years.

The payments of twenty-five pounds, and fifty pounds a year, bearing no reaſonable proportion to the value of the tithes, in lieu whereof they were paid, and the plaintiff conceiving himſelf juſtly intitled to receive thoſe tithes in kind, or a fair compoſition for the value thereof, gave due notice to the defendant, that he would not accept the payments in

queſtion after *Lady-day* 1773, but would from thence forward take the tithes in kind, and the defendant Lord *Brownlow* diſputing his title to, and withholding the payment of ſuch tithes, the plaintiff was under the neceſſity of reſorting to a court of equity to eſtabliſh his right to the ſaid tithes, againſt the impropriate rector, and accordingly, on 21 *January*, 1774, filed his bill in the court of *Chancery* againſt the ſaid Lord *Brownlow*, and againſt *Thomas Mewburn*, *George Richardſon*, *Sanderſon Henrey*, *William Blackwell*, *Ralph Speechley* the younger, *David Bowker*, *James Arnold*, and *John Kingſton*, (occupiers of lands and tithes in *Farcet Fenn*, and of incloſed fenn lands in *Stanground* as tenants to the ſaid Lord *Brownlow*) and againſt *William Chapman*, *Robert Johnſon*, and *Daniel Plummer*, (other occupiers of land in *Farcet Fenn*, as tenants to Sir *Samſon Gideon*) and againſt the maſter, fellows, and ſcholars of *Emanuel College*, *Cambridge*, ſtating (amongſt other things) that by virtue of the ſaid ſeveral endowments and grants, or by virtue of ſome preſcription from time immemorial, or ſome uſage, the plaintiff, as vicar of the ſaid church, was intitled to all and ſingular the tithes of wool, lambs, calves, corn, grain, and hay (except the tithes of hay of the meadows of *Kings Delf*, *Milby*, and *New Mead*) ariſing within the ſaid village, town, and hamlet of *Farcet*, and to all tithes of wool and lambs (except the tithe of wool and lambs of the *Bureſted* or *manor houſe*) throughout the hamlet of *Stanground*, and to *Eaſter* dues and offerings and the tithes of wood and reed, and all other ſmall and vicarial tithes whatſoever, ariſing within the ſaid pariſh of *Stanground*, and the ſeveral manors, villages, and hamlets of *Stanground* and *Farcet* aforeſaid, and the titheable places thereof; and charging, that the ſaid defendant, *Thomas Mewburn*, and the other defendants the occupiers

occupiers, had, from and ſince *Lady-day* 1773, ſeverally held and occupied ſundry lands in the ſeveral parts of *Parcet Fenn*, and in the fenn lands and incloſed grounds of *Stanground* therein ſpecified, and had taken all the tithes thereof and of other lands therein mentioned, which were of right payable and belonged to the plaintiff, and refuſed to pay or account to him for the ſame; and that the defendant, Lord *Brownlow*, as lay rector or impropriator of the ſaid church, diſputed the plaintiff's title to the ſaid tithes; and that the ſaid maſter, fellows, and ſcholars refuſe to join with the plaintiff in the ſaid ſuit, or to aſſiſt him in the recovery of the ſaid tithes; and therefore praying that the ſaid defendants, the occupiers, might account with, and make ſatisfaction to the plaintiff for the ſingle value, and of all and every the ſaid tithes, ſo by them withheld or ſubſtracted; and that the plaintiff's right and title, as vicar of the ſaid church, to the ſaid tithes, might be eſtabliſhed againſt all claims and demands of the defendant Lord *Brownlow*, as lay rector and impropriator thereof, and that the ſaid defendants the maſter, fellows, and ſcholars might be decreed to act as truſtees for the plaintiff's benefit, and for general relief.

The defendant, Lord *Brownlow*, on 18 *June* 1774, put in a plea in bar to the diſcovery and account ſought by the bill, that he was impropriator of the rectory of the ſaid church, and therefore not bound to make ſuch diſcovery.

The ſaid defendant at the ſame time put in his anſwer to the remainder of the bill, and thereby inſiſted, that the plaintiff had no title againſt him, as impropriator, to any tithes ariſing within the ſaid pariſh, over and beſides ſuch as the plaintiff had then before

before taken and enjoyed, and not admitting, but on the contrary, diſputing the plaintiff's title (and reſerving to himſelf ſuch right as he ſhould be able to make out as impropriator againſt the plaintiff) as vicar, to ſuch tithes, as he had ſince his inſtitution and induction taken without diſpute or controverſy.

The ſaid defendant, *Thomas Newburn*, and the other defendants the occupiers put in ſimilar pleas in bar to the diſcovery prayed by the bill, and filed anſwers to the remainder of the bill 8 *July* 1774.

The ſaid pleas were argued before the Lord Chancellor, 19 *December* 1774, and over-ruled, and the plaintiff having taken exceptions to the ſaid anſwers, and afterwards amended his bill, the ſaid defendants were ordered to anſwer the exceptions and amendments together.

The ſaid defendants accordingly, in *Hilary* vacation 1776, put in their further anſwers to the original and amended bill, and the anſwer of the defendant Lord *Brownlow* being again excepted to and reported inſufficient,

The ſaid defendant, 6 *March* 1777, put in a further anſwer to the ſaid amended bill.

The ſaid defendant by his ſaid anſwer diſputed the exiſtence and validity, as well of the ancient endowments, as of the grants of Sir *William Mildmay*, and forced the plaintiff to the proof of his title againſt the ſaid defendant Lord *Brownlow* as impropriator, not only to the tithes really in diſpute, but to all the tithes belonging or which had uninterruptedly been enjoyed as parcel of the vicarage.

The

The defendants the occupiers by their further anſwer diſcovered the lands in their reſpective tenures, and rendered an account of the tithes ariſen therefrom ſince *Lady-day* 1773.

The maſter, fellows, and ſcholars of *Emanuel College* put in their anſwer, ſtating the grants of Sir *Walter Mildmay*, and ſubmitting to produce them in ſupport of the plaintiff's title.

The plaintiff having replied to the anſwers, and entered into proofs in ſupport of his claims, the cauſe came on to be heard in *Michaelmas* Term, 1778, before the Lord Chancellor, and the defendant Lord *Brownlow* then (as he had done before by his anſwers) ſet up his title as impropriator to all the tithes of the rectory, which could not be proved to have been legally granted or taken from it, *and refuſed to admit that the plaintiff was intitled to any tithes whatſoever*, but inſiſted on putting in iſſue the whole of his claims as well under the ancient endowments as under the grants, whereupon the court on 5 *December* 1778 decreed, that the parties ſhould proceed to a trial at law, at the aſſizes to be holden for the county of *Huntingdon* by a ſpecial jury, on ſeveral iſſues, which (was afterwards ſettled by the maſter) were as follow, *viz.*

1. *Whether the plaintiff, as vicar of the pariſh of* Stanground cum Farcet, *was intitled by endowment, preſcription, grant or otherwiſe*, to all other tithes, except the tithes of corn, grain, hay, wool, lambs, and calves, *growing, renewing, or accruing in, upon, or out of all the lands in the ſaid pariſh, which had been in the occupation of the defendants to the bill reſpectively, ſince* Lady-day, 1773.

2. *Whether*

2. *Whether the plaintiff, as vicar as aforesaid, or the master, fellows, and scholars of* Emanuel *College,* IN TRUST *for him, was or were intitled by endowment, prescription, grant, or otherwise,* to the tithes of wool, lambs, and calves, *growing, renewing, or accruing, in, upon, or out of the lands which had been in the occupation of the several other defendants respectively at any time since* Lady-day, 1773.

3. *Whether the lands called* King's Delf, Eight Roods, Conqueſt Lands, New Meadow, Milby *the* Pingles Berkleys *or the* Adventures Lands, *and* Farcet Common Fenn, *out of which the plaintiff, by his bill, ſought tithes, lay within the common of* Farcet.

4. *Whether the plaintiff, as vicar as aforeſaid, or the ſaid maſter, fellows, and ſcholars,* IN TRUST *for him, was or were intitled by endowment, preſcription, grant or otherwiſe,* to the tithes of corn and grain, *growing, renewing, or accruing, in, upon, or out of the lands in the occupation of the other defendants to the ſaid bill reſpectively, in the hamlet of* Farcet.

5. *Whether the plaintiff, as vicar as aforeſaid, was intitled by endowment, preſcription, grant or otherwiſe, to one third part of the tithes mentioned in the laſt iſſue.*

6. *Whether the maſter, fellows, and ſcholars of* Emanuel *College,* Cambridge, *were intitled by endowment, preſcription, grant or otherwiſe, to two third parts of the ſame tithes.*

And

And it was ordered, that the jury ſhould have a view, in caſe the court of *King's Bench* ſhould think fit; and that the now plaintiff ſhould be plaintiff at law, and the defendant Lord *Brownlow*, defendant at law; who was forthwith to name an attorney, to accept a declaration, and appear and plead to iſſue, and it was referred to maſter *Popys* to ſettle the ſaid iſſues, in caſe the parties differed about the ſame; and it was further ordered, that all deeds, books, papers, and writings, in the cuſtody of any of the parties, relating to the matters in queſtion, ſhould be produced before the ſaid maſter upon oath, and that either of the ſaid parties ſhould be at liberty to inſpect the ſame, and take copies thereof, or of ſuch parts thereof, as they ſhould be adviſed, at their own expence; and it was further ordered, that ſuch of the ſaid deeds, books, papers, and writings, as either ſide ſhould give notice to have produced at the ſaid trial, ſhould be produced * accordingly, and his lordſhip reſerved the conſideration of coſts and of all further directions, until after the ſaid trial ſhould be had.

The ſaid iſſues came on to be tried on 29 *July* 1780, at the aſſizes at *Huntingdon* before Mr. Juſtice † *Willes* and a full ſpecial jury, five of whom had taken a previous view (under the rule of the court of *King's Bench*) of the lands in queſtion, and after a trial, which laſted two entire days, the jury returned the following verdicts on the ſeveral iſſues, *viz.*

On the firſt iſſue; for the plaintiff generally.

* *N. B.* The defendant Lord *Brownlow* was called upon to produce all papers and writings accordingly, and did produce ſome papers, but refuſed to ſhew any that came under the deſcription of title-deeds; the plaintiff produced all papers or writings in his poſſeſſion.

† See the "*Nomenclature* of *Weſtminſter-hall*," at the end of the "Biographical Hiſtory of Sir *William Blackſtone*." *Octavo* ed. t. 1782.

On

On the ſecond iſſue for the plaintiff, (except as to the lands called *Berryſtead farm.*)

On the third iſſue; for the plaintiff, (except *ſixty doles*, part of the lands called *King's Delfe*, which the jury found to be within the hamlet of *Stanground.*)

On the fourth, fifth, and ſixth iſſues; for the plaintiff generally.

The Caſe of the * *Defendants.*

The pariſh of *Stanground* is ſituated partly in the county of *Huntingdon*, and partly in the iſle of *Ely*, and county of *Cambridge*; a conſiderable part of it is within the great level of the fenns, known by the name of the *Bedford Level*; and within this pariſh is the vill or hamlet of *Farcet.*

The church of *Stanground* was appropriated to the monaſtery of *Thorney*, one of the greater monaſteries diſſolved in the reign of King *Henry* the *Eighth*, and on the diſſolution, the manor and rectory impropriate, with other poſſeſſions of the monaſtery, came to the crown, and were afterwards granted, by ſeveral letters patent in the reign of Queen *Elizabeth*, to Sir *Walter Mildmay*, Knight, then Chancellor of the *Exchequer*, whoſe right and intereſt under theſe grants at the time of his death, having deſcended to his grand-daughter became veſted in her ſon, *Mildmay*, Earl of *Weſtmoreland.*

In this family they continued till 1674, when they were purchaſed by Sir *John Brownlow*, Baronet, (an

* Taken from the appellant's caſe, in this cauſe, on appeal.

anceſtor

anceſtor of the defendant Lord *Brownlow*) and conveyed by *Charles* Earl of *Weſtmoreland*, to the uſe of the ſaid Sir *John Brownlow*, his heirs and aſſigns for ever.

From the time of this purchaſe the eſtate has continued in his family without interruption; but as ſoon as the defendant Lord *Brownlow* came into poſſeſſion, a large quantity of rectorial tithes were demanded by the plaintiff, who claimed tithes as vicar of *Stanground*, to tithes in kind of a vaſt extent, and amongſt others, to the tithes of all the corn and grain ariſing from three thouſand acres and upwards of lands, which he alledged to have been formerly part of a fenn called *Farcet Fenn*.

The plaintiff was then and ſtill is in poſſeſſion of all ſuch vicarial tithes and profits of the vicarage, as have been at any time enjoyed by any of his predeceſſors; the tithes which he newly claimed had been conſtantly and uniformly enjoyed by the defendant Lord *Brownlow*'s family, from the time of their purchaſe in 1674, and by the *Weſtmoreland* family before them, and the poſſeſſion of the ſeveral ſucceſſive impropriators can be clearly traced much higher than a century, as well from records in courts of law, as from depoſitions of witneſſes recorded in the court of *Chancery*.

The grounds of the plaintiff's claims were totally unknown to the defendant Lord *Brownlow*, who was adviſed that, as the right of the impropriator to all tithes whatſoever is founded on the common law, his title to the tithes in queſtion were ſo ſecured by length of poſſeſſion under judicial deciſions, that any attempt to diſturb it muſt be ineffectual; ſome of the lands

lands from which tithes are now claimed by the vicar, were in the hands of the abbot and convent of *Thorney* at the time of their diſſolution, and have, ever ſince, been enjoyed by the owners *tithe free*, without any claim from any impropriator or vicar; from other lands *moduſes* in lieu of ſeveral *ſpecies* of tithes have been immemorially paid; the claims of the plaintiff muſt therefore affect the property of many inhabitants in ſo large a pariſh; and as tithes are due, *communi jure*, to the rector, who has not called in queſtion any of the before-mentioned exceptions, which have been long enjoyed by the pariſhioners, and as a vicar has no right by the common law, the plaintiff ought to ſhew ſome other clear and unexceptionable title in ſupport of new claims; but on the contrary, he ſupports them by conjecture, and facts ſo obſcured by antiquity, that they can neither be underſtood with accuracy, nor proved with any reaſonable degree of certainty; and moſt of his new claims are inconſiſtent both with law and evidence.

For better underſtanding the proceedings, which have been had in ſupport of theſe claims, it may be neceſſary to ſtate the proviſions which appear to have been made for the vicarage.

No original endowment of this vicarage is extant, but from ſome entries the vicarage appears to have been endowed in 1402, of all tithes, except corn, grain, and hay, wool, lamb, calves when payable in kind, and ſuch other tithes as are comprehended by the words *garbarum cujuſcunque generis* and *bladorum*; by a ſubſequent endowment in 1444, it is augmented by the gift of a third part of tithe corn *in campis de Farſhed*.

The

The evidence of these endowments will be seen in the * Appendix.

No further indowment appears; but from two obscure deeds, under the hand and seal of Sir *Walter Mildmay*, and from an ancient yearly payment of twenty-five pounds, the plaintiff now sets up claims which do not appear to have been made by any of his predecessors.

This annual payment has been made for a great number of years, and is supposed to have commenced in 1640, in lieu of some tithes under the first endowment; but it can give no colour or pretence to support the plaintiff's new claim, for reasons which are hereafter more particularly mentioned.

The above mentioned deeds bear date 24 *October*, 1588, and 11 *April*, 1589, and are set forth *verbatim* in the said appendix.

The construction of them at this distance of time is difficult and uncertain; but the intention of them appears to be, to augment the vicarage by a grant of the tithes of wool, lamb, and calf, within the limits of *Farcet*, and to give all the tithe corn within those limits, instead of the third part of the tithe corn of which the vicar had been endowed, with an exception of certain lands described in the deed.

A larger augmentation of the vicarage has never been claimed by any former vicar under these ancient instruments.

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* See the "Appendix to the appellant's case" in this cause, under *Trinity* Term, 22 *Geo.* III.

And if the plaintiff is now at liberty, after ſuch a diſtance of time, to open his extenſive claims from an *æra* of ſuch remote antiquity, without regard to a long poſſeſſion, many queſtions of law, as well as of fact, muſt ariſe on theſe ancient deeds; they bear date above ſeventy years before the reſtoration, when the caſe of vicarages, which could only be augmented by endowments, came under the conſideration of parliament, who by ſtat. 17 *Car.* II. *chap.* 3. gave a power to impropriators, which they had not before, to augment vicarages by a gift of tithes, or a ſettlement in truſt; if Sir *Walter Mildmay* had ſuch a power in the reign of Queen *Elizabeth*, his grants could not operate as a legal execution of it; for tho' he might enable the college to take for their own benefit, yet he could not empower one corporation to take in truſt for another corporation: if ſuch a truſt could be eſtabliſhed under theſe grants, the difficulty of aſcertaining what tithes are granted, and what are excepted, involves it in many queſtions of fact, blended with queſtions of law, both as to the granted and the excepted tithes: the limits of *Farcet*, within which the granted tithes are confined, and the lands which are excepted, were well known at the time of the grants; but ſince that time the ſtate of the country has been ſo changed, that neither the parochial limits at the time of the grant, nor the identity of all the excepted lands, can be aſcertained by any other poſſible means than enjoyment; for it appears from ancient deeds, and from the declaration of the parliament, that the boundaries of lands in the *Bedford Level* were unknown when the act was made for ſettling the drainage of them, and every attempt to aſcertain them from acts done ſince, is founded in injuſtice, and expreſsly repugnant to the ſenſe of the legiſlature.

17 *Car.* II. *c.* 3.

The

The unreaſonable extent of the claims made by the vicar, may be better underſtood by ſome account of the lands out of which he now claims tithes of every denomination; of theſe lands nine hundred and forty acres were given by the parliament to the undertakers of the great work of draining the level, and they are now known by the name of the *Adventurer's Lands:* other lands are called *King's Delph*, *Eight Roods*, *Conqueſt Lands*, *New Meadow*, *Milby*, *The Pingles*, and one thouſand three hundred acres, now known by the name of *Farcet Common Fenn:* from the changes and alterations of theſe lands by drainage and other improvements, the ancient and modern ſtate of them cannot admit of any compariſon, from which any arguments can be drawn to guide any judgment on facts, on which ſuch antiquated claim depends; poſſeſſion muſt be the beſt guide, and as there has been a long continued and adverſe poſſeſſion in the impropriators after ſeveral trials at law, the defendant Lord *Brownlow* is adviſed that the following account of deciſions in adverſe ſuits, and conſtant poſſeſſion under ſuch deciſions, can leave no room for doubt.

In the year 1663 was made ſtat. 15 *Car.* II. chap. 17. intitled, "An act for ſettling the draining of the great level, called *Bedford Level.*" 15 *Car.* II. chap. 17.

About two years afterwards, as appears by old depoſitions, *viz.* about 1665, the Earl of *Weſtmoreland* (the impropriator) obtained a verdict in an action for tithes againſt the tenants of ſome improved lands within this level.

In 1669, another verdict was obtained by the earl in an action on the ſtatute for ſubſtraction of

tithes of corn for lands in the ſame level; and there is proof from old depoſitions of colluſive agreements between the vicar and the owner of thoſe lands to defraud the earl, the then impropriator, and to prevent the recovery in thoſe actions; no other claim was made on the part of the vicar; but about thirteen years afterwards, whilſt the then impropriator, *William Brownlow*, Eſq; the defendant Lord *Brownlow*'s great grandfather, was in his minority, *viz.* 1682, an action was brought to trial in *Huntingdon*, in which *Emanuel* college were plaintiffs, againſt the tenants of other lands in the ſame level, for ſubſtraction of tithes of corn in the hamlet of *Farcet*; this action was defended by the guardians of the infant impropriator, and the plaintiffs were nonſuited.

The record of this nonſuit and of the judgment entered for the earl, on the verdict of 1669, can be produced, and it appears from depoſitions and otherwiſe, that the nonſuit was on the merits.

Depoſitions of old witneſſes in the year 1684, are recorded in *Chancery*, by which the following facts appear, that the lands called *King's Delph*, *Eight Roods*, *Milby*, and *New Meadow*, were part of the demeſne lands, and had been long leaſed as ſuch; that the tithes of theſe lands had been conſtantly paid to the impropriator, and that they were the lands for which the college claimed tithes of corn in the laſt mentioned action; that the tithes of other lands in the *Bedford Level* were conſtantly paid to the impropriator, and that the verdict in 1665, was for the tithes of ſome of theſe lands.

From the time of the nonſuit in the laſt mentioned action, all the tithes in the *Bedford Level*, have

have been conſtantly received by the impropriator, without any ſubſequent claim by the college or vicar to any of them, except the tithes of the before mentioned one thouſand three hundred acres, which, after the year 1682, were improved under the ſaid act of *Charles* the *Second*; as to all other lands within the level, the defendant Lord *Brownlow* relies on conſtant and uninterrupted poſſeſſion ſince the laſt mentioned nonſuit in 1682, without any colour for diſturbing ſuch a poſſeſſion, or reviving the former ſuits, which have been ſo long ſilenced, and buried in oblivion.

Soon after the above-mentioned one thouſand three hundred acres of land were improved, and ſeveral actions for tithe of corn were brought by *Emanuel* college, againſt the tenants of the newly improved lands; and in 1685, one of the ſaid actions was brought to a trial at *Huntingdon*, in which the college were nonſuited; the record of the judgment on this nonſuit can likewiſe be produced.

From this time the claim of the vicar to tithe of corn out of any lands in the *Bedford Level*, under the grants of Sir *Walter Mildmay*, was finally relinquiſhed, and no traces appear of any further ſteps to aſſert it, but ſtill, as the claim of the vicar to tithes out of lands under the two endowments remained diſputable, about three years after the laſt mentioned action, an agreement was entered into for the ſake of avoiding further ſuits concerning thoſe tithes, *viz.* that the vicar ſhould make a leaſe of ſuch tithes as he was intitled to, to the impropriator who ſhould pay fifty pounds a year for the ſame to the vicar; and accordingly, in 1688, a leaſe was made by *Joſhua Ratcliffe*, the then vicar, to *William Brown-*

law, Eſq; the then impropriator, of ſuch tithes as were claimed by the vicar, the right to which was then undecided, at the yearly rent of fifty pounds; the leaſe is loſt, but that there was ſuch, appears by recital in a ſubſequent one, and in 1691, another leaſe was made between *Samuel Doughty* as vicar, out of the fenn called *Farcet Fen*, containing two thouſand two hundred and forty acres, or thereabouts, for five years, if the ſaid *Samuel Doughty* ſhould ſo long continue vicar of the vicarage aforeſaid, under the yearly rent of fifty pounds.

The yearly rent reſerved by theſe leaſes continued to be paid to the ſeveral ſucceſſive vicars, without any renewal of the ſaid leaſe in writing for many years, and after ſixty years, and upwards, from the time of the firſt leaſe, which was loſt, and when nothing more was known of the origin of this agreement, but from tradition and uncertain report, the ſaid agreement was again confirmed by the renewal of the ſaid leaſe; and accordingly, in 1751, by indenture between *William Whitehead*, clerk, vicar of *Stanground*, of the one part, and the right honourable Sir *John Brownlow*, Baronet, Lord Viſcount *Tyrconnel*, impropriate rector of the ſaid pariſh, of the other part; the ſaid *William Whitehead* leaſed to the ſaid Lord Viſcount *Tyrconnel* all tithes due or belonging to him as vicar, out of the ſaid two thouſand two hundred and forty acres, in the ſaid former leaſe mentioned, under the ſaid yearly rent of fifty pounds.

Theſe two leaſes of 1691 and 1751, are ſet forth in the * appendix.

* See the appendix to the appellant's caſe, in this cauſe, under *Trinity* Term, 22 *Geo.* III.

Though it plainly appears from theſe leaſes, and from the nature of the caſe, that the old agreement was an amicable compromiſe of the uncertain right to ſuch tithes, as the vicar claimed in his own right, out of thoſe lands only, which are ſpecified and deſcribed in both leaſes, and that there is no ground to conſider them as leaſes of any other tithes, of which a valid leaſe in law could only be granted by the college, whoſe legal title had been manifeſted by their being plaintiffs in the action; yet theſe leaſes are now inſiſted on by the plaintiff, as an acknowledgment of his right to all tithes whatſoever, out of all the other lands not comprized in the leaſes, notwithſtandſtanding the judgments in the ſeveral actions, and the long poſſeſſion againſt his predeceſſors.

On 21 *January*, 1774, the plaintiff filed his bill in the high court of *Chancery* againſt the defendant Lord *Brownlow*, and ſeveral occupiers of the abovementioned lands for all tithes in kind, and prayed that his title to ſuch tithes might be eſtabliſhed againſt the defendant Lord *Brownlow*.

On 18 *June* the defendant Lord *Brownlow* put in a plea and anſwer, but the plea being informal was *over-ruled*.

The plaintiff, 4 *March* 1775, amended his bill, and after ſtating the endowments and grants, and the leaſes above-mentioned, and a great number of hiſtorical facts concerning the ancient boundaries of the vill of *Farcet*, and the fenn called *Farcet Fenn*, concluded with the prayer above-mentioned.

The defendant, Lord *Brownlow*, 8 *February*, 1776, put in his anſwer to the amended bill, and

being an entire ſtranger to moſt of the facts therein alledged, he referred to ſuch proofs as the plaintiff could make of them, and ſubmitted to the judgment of the court his title as impropriator, and whether the plaintiff ought to be aided in reviving dormant titles.

The ſaid cauſe was heard before the Lord High Chancellor, on 9, 10, 11, and 13 *November*, 1778, and on 5 *December* following; and thereupon his lordſhip was pleaſed to direct three iſſues in a feigned action to try the vicar's title under the ſaid endowments and grants; which iſſues were varied on ſubſequent motions made by the plaintiff, and were divided into ſix, *viz.*

1. *Whether the plaintiff, as vicar of the ſaid pariſh church of* Stanground cum Farcet, *or the maſter, fellows, and ſcholars of* Emanuel *college in* Cambridge, *in truſt for him, was or were intitled by endowment, preſcription, grant, or otherwiſe, to all other tithes (except the tithes of corn, grain, hay, wool, lambs, and calves) growing, renewing, or accruing in, upon, or out of all, or any, and which of the lands in the ſaid pariſh, which had been in the occupation of the ſeveral defendants to the ſaid bill reſpectively, at any time ſince* Lady-day, 1773.

2. *Whether the plaintiff, as vicar of the ſaid pariſh of* Stanground cum Farcet, *or the ſaid maſter, fellows, and ſcholars, in truſt for him, was or were intitled by endowment, preſcription, grant, or otherwiſe, to the tithes of wool, lambs, and calves, growing, renewing, or accruing, in, upon, or out of all or any, and which of the lands in the ſaid pariſh, that had*

had been in the occupation of the ſeveral defendants to the ſaid bill reſpectively, at any time ſince Lady-day, 1773.

3. *Whether the lands called* King's Delph, Eight Roods, Conqueſt Lands, New Meadow, Milby, The Pingles, Berkley's, *or the* Adventurers Lands, *and* Farcet Common Fenn, *out of which the plaintiff by his bill ſought tithes, lay within the vill, town, or hamlet of* Farcet,

4. *Whether the plaintiff, as vicar of the ſaid pariſh of* Stanground cum Farcet, *or the ſaid maſter, fellows, and ſcholars, in truſt for him, was or were intitled by endowment, preſcription, grant, or otherwiſe, to the tithes of corn and grain, growing, renewing, or accruing, in, upon, or out of the lands which had been in the tenure of the defendants the occupiers, to the above-mentioned bill reſpectively, in the vill, town, or hamlet of* Farcet, *at any time ſince* Lady-day, 1773,

5. *Whether the plaintiff, as vicar of the ſaid pariſh of* Stanground cum Farcet, *was intitled by endowment, preſcription, grant, or otherwiſe, to one third part of the tithes of corn and grain, growing, renewing, or accruing in, upon, or out of the lands, which had been at any time ſince* Lady-day, 1773, *in the tenure of the occupiers, the defendants to the ſaid bill reſpectively, in the vill, town, or hamlet of* Farcet,

6. *Whether the ſaid maſter, fellows, and ſcholars, in truſt for the plaintiff, as vicar of the ſaid pariſh of* Stanground cum Farcet, *were intitled by endowment, preſcription, grant, or otherwiſe, to one third part of the tithes of corn and grain, growing, renewing,*

renewing, or accruing, in, upon, or out of the lands which had been at any time, ſince Lady-day, 1773, *in the tenure of the occupiers the defendants to the ſaid bill reſpectively, in the vill, town, or hamlet of* Farcet.

The ſaid iſſues were tried at the ſummer aſſizes 1780, at *Huntingdon*, before Mr. Juſtice * *Willes*, who admitted a great deal of modern evidence on the part of the plaintiff, which was not admiſſible; and not only rejected admiſſible evidence on the part of the defendant Lord *Brownlow*, but refuſed many queſtions of law to be debated, declaring, that the iſſues were ſent to be tried on queſtions of fact only; and the jury under ſeveral apparent miſdirections of the ſaid judge, found the following verdict.

They found the ſaid FIRST iſſue generally for the plaintiff.

They alſo found the ſaid SECOND iſſue for the plaintiff, except as to *Buriſted Farm*.

They alſo found the ſaid THIRD iſſue for the plaintiff, except ſixty doles of *King's Delph*, which they found to be within the hamlet of *Stanground*.

They alſo found the ſaid FOURTH, FIFTH, and SIXTH iſſues generally for the plaintiff.

See this cauſe on appeal, under Trinity *Term*, 22 Geo. III.

* See the "*Nomenclature* of *Weſtminſter-hall*," annexed to "the Biographical Hiſtory of Sir *William Blackſtone*." *Octavo* edit. 1782.

Hilary

Hilary Term, 19 Geo. III.

January 26, A. D. 1779.

In the *Houſe of Lords*.

Thomas Whitehead, *William Whitehead*, and *John Bowker*, executors of *William Whitehead*, deceaſed, *Ralph Davies*, and *Elizabeth Bateman* (which ſaid *William Whitehead* deceaſed, *Ralph Davies*, and *Elizabeth Bateman* reſpectively, were occupiers of lands in the townſhips of *Great Sutton*, and *Little Sutton*, within the pariſh of *Eaſtham*, in the county of *Cheſter*, in 1771,) } Appellants,

The reverend *George Travis* clerk, vicar of the ſaid pariſh of *Eaſtham*, } Reſpondent,

The caſe of the * Appellants.

THE appellants apprehending themſelves aggrieved by the ſaid ſeveral decrees of 18 *Dec.* 1775, [which ſee under *Michaelmas* Term, 16 *Geo.* III.] and 1 *July*, 1777, [which ſee under *Trinity* Term, 17 *Geo.* III.] have appealed there-

* See the caſe of the defendants in this cauſe, under *Michaelmas* Term, 16 *Geo.* III.

from

from to your Lordſhips, and humbly hope the ſame ſhall be reverſed for the following (among other)

REASONS:

1. That although a rector, whether lay or appropriate, is intitled to tithes of common *right*, and, on a bill brought by him for tithes, has nothing more to prove, than that he is rector; and it is incumbent on the defendant to prove an exemption or diſcharge, or a title to the tithes; yet the eaſe of a vicar is totally different, and it is as clear and ſettled a rule, that when there is a rector, *primâ facie* all the tithes in the pariſh belong to him, as that in order to ſupport a a bill by a vicar for tithes in kind, he muſt prove his right to ſuch tithes, which muſt be either by ſhewing an actual endowment, or by preſcription or uſage.

2. That the reſpondent in this caſe has not produced or proved any actual endowment of the vicarage, nor has he given any evidence of the taking or receipt of any tithe hay in kind, in the ſaid townſhips of *Great* or *Little Sutton*, by any of his predeceſſors; but the only evidence on which he founds his claim to the tithe of hay from the appellants ſeveral farms, is the payment of the ſaid penny called a tilt penny, which ſome witneſſes (who are all common country people) for the reſpondent have ſaid, they were or believed was paid for tithe hay, but in a very vague and partial way (often obſervable in depoſitions), and without giving any reaſons for ſuch belief, or ſaying how or by whom they were ſo informed, and ſo as not to be admitted as legal evidence; that by ſuch ſort of oral teſtimony, the reſpondent endeavours at this day, after an immemorial

morial enjoyment to the contrary, to apply the tilt penny, as a payment for tithe, and yet in a manner not to be good as a *modus*, but ſtill as evidence to ſupply the want of endowment and enjoyment, and by ſuch means to come at the tithe hay in kind from the appellants farms, though it appears by the tithe table, which was in the reſpondent's power, that the tilt penny was from every houſe; and the reſpondent not having alledged or charged any thing in his bill relating to the ſaid tilt penny, in any manner, it was impoſſible for the appellants to give any anſwer to ſuch his evidence, or to examine any witneſſes to contradict it, or to croſs examine the witneſſes produced by him, relating thereto, or to ſay any thing relating thereto; and the evidence produced and read by the ſaid reſpondent in ſupport of his claim, and relating to the ſaid tilt penny, was much too looſe and inconcluſive for a court of equity to make a decree in favour of the reſpondent, a vicar, in the firſt inſtance, for payment of a tithe in kind, againſt common right, and which neither he, nor any of his predeceſſors, had ever before taken, enjoyed, or claimed, and particularly ſo, as no evidence ought to have been ſuffered to have been read to matters, which were not charged or alledged by the bill, or in iſſue between the parties, in the cauſe.

3. That the claim to tithes, is, in its nature, a legal claim, and the right to tithes a legal right, and in the caſe of a bill filed in a court of equity by the reſpondent, a vicar, for the payment of tithes in kind, and the vicar's right to the ſaid tithes being denied by the defendant's anſwer, and evidence proving that he never had enjoyed or received the tithes demanded, and he having given no clear evidence of his

his right thereto, it is ſubmitted by the appellants, that a court of equity (which has no original juriſdiction in matters of tithe, but gives relief in conſequence of the account prayed) ought not, in the firſt inſtance, to have decreed in favour of the reſpondent, and thereby (in effect) eſtabliſhed his right; but ought either to have left him to his remedy at law for the recovery of the tithe *of* hay, or have *directed* an iſſue *to* try whether the reſpondent, as vicar of *Eaſtham*, was or was not endowed of the ſaid tithe of hay; upon which iſſue, and a *viva voce* examination of the witneſſes, the queſtion would certainly be better and more fully diſcuſſed and decided, than it could be by the court of *Exchequer* upon the depoſitions; and when the moſt material part of the evidence was taken and received, it was impoſſible, as before mentioned, for the appellants to give it any anſwer.

4. That beſides the aforeſaid reaſons, it is an additional objection to the ſaid decree, as to the relief given againſt the appellant, *Elizabeth Bateman*, that the farm occupied by her has not been incloſed from the waſte above forty years, and therefore there could be no pretence that the penny called the tilt penny was in reſpect of that, and conſequently no ſatisfaction whatſoever could be pretended to have been ever paid in lieu of tithe hay of that farm, and the reſpondent had no evidence in ſupport of his right to the tithe hay ariſing thereon.

5. That it is certain, that the appellants and the former occupiers, or owners of their ſaid farms, have, from time immemorial, invariably taken and enjoyed the hay ariſing therefrom for their own uſe, without paying any tithe thereof; and it never was conceived by any of them that they paid any ſatisfaction for the ſame; and

and therefore the appellants humbly inſiſt, that, in favour of ſuch long enjoyment, a grant of ſuch tithe hay ought to be preſumed by every court of juſtice to have been made by the perſon or perſons capable of making the ſame.

6. That for the reaſons aforeſaid, and as the claim to the tithe of hay in kind, made by the reſpondent, was never made by any former vicar of the ſaid pariſh, nor by him until ſeveral years after he became vicar thereof; and as the appellants did no more than defend what they apprehend they have a legal right to, and to preſerve the ancient uſage in the ſaid pariſh; they humbly apprehend that the court of *Exchequer* ought not to have decreed them to pay the reſpondent the coſts of the ſaid ſuit.

Thomas Whitehead, *William Whitehead*, *John Bowker*, parties (by bill of revivor) as executors of the laſt will and teſtament of *William Whitehead* deceaſed, who was a defendant in and died after the firſt hearing of this cauſe, and who was, in the year 1771, owner and occupier of *three* tenements, within the townſhip of *Little Sutton*, in the pariſh of *Eaſtham*, in the county of *Cheſter*, and occupier only of *two* other tenements there, under *Thomas Wittle*, gentleman, the owner thereof; *all* which } Appellants

were

were in 1771, and the *three* firſt for many years preceding had been, occupied as *one* farm or tenement within the ſaid pariſh: *Ralph Davies*, occupier only, in 1771, under *George Buſhel* and *George Robins*, gentleman, of *four* tenements in the townſhip of *Great Sutton*, all which were in 1771, and for ſeveral years preceding had been, occupied as *one* farm or tenement within the ſaid pariſh: *Elizabeth Bateman*, occupier only, in the ſaid year, under *Thomas Cholmondeley*, Eſq; of certain lands incloſed in 1735, from the waſte or commonable lands, within the townſhip of *Great Sutton* aforeſaid, called *Motherleſs Heath*. } Appellants.

George Travis, clerk, vicar of the ſaid pariſh, and pariſh church of *Eaſtham*. } Reſpondent.

The Reſpondent's * *Caſe.*

FROM the decree (which ſee, under *Michaelmas* Term, 16. *Geo.* III.) the executors of the late *William Whitehead*, and the defendants *Davies* and

* See the caſe of the plaintiff, in this cauſe, under *Michaelmas* Term 16 *Geo.* III.

Bateman,

Bateman, have appealed to this * *honourable* houſe; but the reſpondent moſt humbly hopes, that the decree ſo complained of, will be affirmed in his favour with exemplary coſts, for the following (among other)

REASONS:

1. Becauſe the defence of the ſeveral appellants ſtands *clearly falſified* in every material point, the executors of the late *William Whitehead* in particular, being now preſenting this appeal in direct oppoſition to an act of parliament, which makes it *impoſſible*, that the defence of their teſtator *could be true*.

2. Becauſe the tilt-penny *modus*, proved in the cauſe was objected to, in the court below, on the ground of *law*, and not of *fact*; and therefore was ripe for the judgement of the court.

3. Becauſe no length of time can give ſanction to a bad *modus*.

4. Becauſe an appeal, like the preſent, following two hearings, in the court below, of *ten* days continuance, and *two* unanimous decrees in that court, after ſix months mature deliberation, in favour of the reſpondents, ſeems (not ſo much to beſpeak the efforts of † *parties*, preſuming themſelves injured, and ſeeking redreſs, as) to betray the determined purpoſe of a powerful combination, *proved in the cauſe*,

* It ought to be *right honourable*. J. R.

† I think had the word *Individuals* been adopted, all poſſible conſtruction of a *political* nature would have been avoided. *J. R.*

to harraſs, and, if poſſible to deſtroy an unſupported individual.

Martis 26 *Januarii*, 1779.

The judgment of the houſe.

Ordered and adjudged, that the decree complained of be reverſed; and it is further ordered, that the court of *Exchequer* do direct a trial to be had at the next aſſizes for the county of *Salop*, or at ſuch other time, as the ſaid court ſhall think fit, upon the following iſſues, "whether the tilt-penny paid by the occupiers of houſes, within the townſhip of *Great* and *Little Sutton*, to the vicar of the pariſh of *Eaſtham*, has been paid and accepted as a *modus* or compoſition, in lieu and in ſatisfaction of tithe hay;" with liberty to indorſe the *poſtea* with any *modus*, which the jury ſhall find reſpecting the payment of the ſaid penny; and it is further ordered, that the reſpondent be plaintiff at law, and the appellants defendants, and that all further directions be reſerved till after the trial: and that the ſaid court of *Exchequer* do give all neceſſary directions, for carrying his judgment into execution.

See the original cauſe, under Michaelmas *Term*, 16 Geo. III. *and on the rehearing, under* Trinity *Term*, 17 Geo. III.

END OF THE SECOND VOLUME.